Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT

and

DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

v.

JOHN SULLIVAN,
Respondent

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit.

Petition for Certiorari Filed June 7, 1979.
Certiorari Granted October 1, 1979.

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

IN THE
SUPREME COURT OF THE UNITED STATES

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JULIUS T. CUYLER, SUPERINTENDENT

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v.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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DOCKET ENTRIES - THIRD CIRCUIT

DOCKET ENTRIES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

APPEAL FROM THE EASTERN DISTRICT OF PENNSYLVANIA

CASE No. 78-1411

SULLIVAN, JOHN,

APPELLANT

V.

CUYLER, JULIUS T., SUPERINTENDENT,
GRATERFORD STATE CORRECTIONAL INSTITUTION

AND

DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

DATE	FILINGS--PROCEEDINGS
1978	
APRIL 10	(FORMA PAUPERIS IN D. C. -- SEE COPY OF ORDER DATED JULY 25, 2977 (JOHN MORGAN DAVIS, U.S.D.J.) GRANTING JOHN SULLIVAN, APPELLANT, LEAVE TO PROCEED IN FORMA PAUPERIS). (SEE COPY OF ORDER DATED FEBRUARY 2, 1978 (JOHN MORGAN DAVIS, U.S.D.J.) STATING THERE EXISTS PROBABLE CAUSE FOR APPEAL, ATTACHED TO COPY OF NOTICE OF APPEAL). COPY OF NOTICE OF APPEAL, RECEIVED MARCH 3, 1978, FILED. RECORD, RECEIVED MARCH 21, 1978, FILED.

CASE No. 78-1411

DATE	FILINGS--PROCEEDINGS
1978	
MAY 3	FIRST SUPPLEMENTAL RECORD (STATE COURT RECORD), FILED. STATE COURT RECORD IN EXHIBIT ROOM (1 BOX).
MAY 10	CONSENT MOTION BY APPELLANT FOR LEAVE TO EXTEND TIME FOR FILING BRIEF AND APPENDIX TO 30 DAYS (TO JUNE 19, 1978), FILED. (4 CC.). CERTIFICATE OF SERVICE ATTACHED.
MAY 12	ABOVE CONSENT MOTION GRANTED. NO FURTHER EXTENSIONS. CLERK.
JUNE 19	APPEARANCE OF MARILYN J. GELB, ESQ. FOR APPELLANT, FILED.
JUNE 19	BRIEF FOR APPELLANT, FILED. (4 CC.), CERTIFICATE OF SERVICE BY MAIL ON JUNE 19, 1978 APPEARS ON LAST PAGE OF BRIEF.
JUNE 19	APPENDIX, FILED. (4 CC.), CERTIFICATE OF SERVICE BY MAIL ON JUNE 19, 1978 APPEARS ON LAST PAGE OF APPENDIX.
JULY 5	APPEARANCE OF MICHAEL F. HENRY, FOR APPELLEE, COMMONWEALTH OF PA. (DISTRICT ATTORNEY OF PHILA. COUNTY), FILED.
JULY 5	CONSENT MOTION BY APPELLEE FOR LEAVE TO EXTEND TIME FOR FILING APPELLEE'S BRIEF TO 30 DAYS FROM JULY 19, 1978 (OR TO AUGUST 18, 1978), FILED. (1 CC). SERVICE IN LETTER OF JULY 5, 1978.
JULY 10	ABOVE CONSENT MOTION GRANTED. CLERK. NO FURTHER EXTENSIONS.
AUG. 17	BRIEF FOR APPELLEE, FILED. SERVICE BY HAND DELIVERY ATTACHED.
OCT. 5	COPIES OF 40 SLIDES, RECEIVED FOR THE INFORMATION OF THE COURT. (IN COURT OF APPEALS SAFE)
NOV. 6	ORDER DATED NOVEMBER 3, 1978 (ALDISERT, C.J.) DIRECTING 20 MINUTES ARGUMENT TIME FOR EAC (SIC) SIDE, FILED.
NOV. 16	ARGUED. CORAM: ALDISERT AND HUNTER, C.J. AND GERRY, D.J.
1979	
FEB. 14	OPINION OF THE COURT (ALDISERT AND HUNTER, C.J. AND GERRY, D.J.*), FILED. * HONORABLE JOHN F. GERRY, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, SITTING BY DESIGNATION.
FEB. 14	JUDGMENT REVERSING THE ORDER OF THE DISTRICT COURT, FILED FEBRUARY 6, 1978, AND REMANDING THE CAUSE WITH DIRECTION THAT THE WRIT OF HABEAS CORPUS SHALL ISSUE DISCHARGING PETITION FROM STATE CUSTODY UNLESS WITHIN A REASONABLE TIME FIXED BY THE DISTRICT COURT PETITIONER IS AFFORDED A NEW TRIAL; WITH COSTS TAXED IN FAVOR OF APPELLANT, FILED.

CASE No. 78-1411

DATE	FILINGS--PROCEEDINGS
1979	
FEB. 27	PETITION FOR REHEARING IN BANC BY APPELLEE, FILED. SERVICE ATTACHED.
MAR. 13	MOTION BY APPELLANT TO SET BAIL IN A REASONABLE AMOUNT PENDING ISSUANCE OF MANDATE IN THIS COURT, FILED. (4CC) SERVICE ATTACHED.
MAR. 14	ANSWER BY APPELLEES TO APPELLANT'S MOTION FOR BAIL PENDING ISSUANCE OF MANDATE, FILED. (5CC) SERVICE ATTACHED.
MAR. 14	PETITION BY APPELLEE TO STAY ISSUANCE OF MANDATE PENDING UNITED STATES SUPREME COURT REVIEW, FILED. (4CC) SERVICE ATTACHED.
MAR. 15	ORDER (ALDISERT, C.J.) STAYING THE ISSUANCE OF THE MANDATE UNTIL JUNE 11, 1979, FILED.
MAR. 12	ORDER (SEITZ, CH.J., ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH AND HIGGINBOTHAM, C.J.) DENYING APPELLEE'S PETITION FOR REHEARING TOGETHER WITH SEPARATE DISSENTING STATEMENT BY JUDGE GARTH WITH WHOM JUDGES ADAMS AND ROSENN JOIN, FILED.
MAR. 16	ORDER (ALDISERT AND HUNTER, C.J. AND GERRY, D.J.) DENYING APPELLANT'S APPLICATION FOR BAIL, THERE BEING NO RECORD THAT AN APPLICATION WAS PRESENTED TO THE STATE COURT IN THE FIRST INSTANCE, AND THEN REFUSED FOR REASONS STATED, AND THERE ALSO BEING NO RECORD THAT AN APPLICATION FOR HABEAS CORPUS WAS PRESENTED IN THE DISTRICT COURT FOR THE REASON THAT BAIL WAS DENIED BY THE STATE COURT SYSTEM, FILED.
MAR. 16	CERTIFIED COPY OF ABOVE ORDER TO CLERK OF D.C.
JUNE 11	NOTICE OF FILING ON JUNE 7, 1979 OF PETITION FOR WRIT OF CERTIORARI, RECEIVED FROM CLERK OF SUPREME COURT, FILED. (S.C. No. 78-1832)
OCT. 3	CERTIFIED COPY OF ORDER DATED OCTOBER 1, 1979 GRANTING PETITION FOR WRIT OF CERTIORARI RECEIVED FROM CLERK OF SUPREME COURT, FILED. (S.C. No. 78-1832).

DOCKET ENTRIES - DISTRICT COURT

DOCKET ENTRIES

IN THE

UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

SULLIVAN, JOHN vs CUYLER, JULIUS T., SUPERINTENDENT, GRATERFORD STATE CORRECTIONAL INSTITUTION

AND

DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

DATE	PROCEEDINGS
1977	
1 JUL	RELATOR'S PETITION FOR WRIT OF HABEAS CORPUS, WITH OATH OF POVERTY AND MEMORANDUM IN SUPPORT THEREOF, FILED.
2 "	ORDER GRANTING PETITION LEAVE TO PROCEED IN FORMA PAUPERIS INCLUDING FILING OF A NOTICE OF APPEAL, FILED. 7/25/77 ENTERED AND COPIES MAILED.
"	REFERRED TO JUDGE MAYTHONS
3 JUL	ORDER THAT DISTRICT ATTORNEY OF PHILA. COUNTY IS ADDED AS A PTY. RESPONDENT AND CAPTION IS SO AMENDED; SPECIFIC AND DETAILED ANSWERS SHALL BE FILED WITHIN 20 DAYS TOGETHER WITH A MEMORANDUM OF LAW; CLERK OF QUARTER SESSION COURT SHALL FORWARD THE COMPLETE STATE COURT RECORD IN TEN(10) DAYS, FILED. 7/27/77 ENTERED AND COPIES MAILED
4 AUG	ANSWER OF DISTRICT ATTORNEY OF PHILA. COUNTY TO RELATOR'S PETITION FOR WRIT OF HABEAS CORPUS, FILED.
-- SEPT	STATE COURT RECORD RECEIVED AND FORWARDED TO COURT ROOM DEPUTY TO JUDGE DAVIS.
1978	
5 FEB	REPORT-RECOMMENDATION, MAYTHONS, J. THAT PETITION FOR WRIT OF HABEAS CORPUS BE GRANTED, ETC., FILED.
6 "	MEMORANDUM, DAVIS, J. AND ORDER AND REPORT IS APPROVED AND ADOPTED INSOFAR AS IT IS NOT IN CONFLICT WITH THE OPINION OF THE COURT; RECOMMENDATION IS REJECTED; PETITION FOR WRIT OF HABEAS CORPUS IS DENIED; THERE EXISTS PROBABLE CAUSE FOR APPEAL, FILED. 2/6/78 ENTERED AND COPIES MAILED TOGETHER WITH REPORT-RECOMMENDATION

DISTRICT COURT DOCKET ENTRIES

7 MAR	RELATOR'S NOTICE OF APPEAL RECEIVED 4:00 P.M. 3/1/78, FILED. 3/2/78 ENTERED AND COPIES MAILED...U.S.C.A. AND H. SENDROW, ESQ.
8 "	COPY OF CLERK'S NOTICE OF APPEAL TO US COURT OF APPEALS, FILED. 3/2/78 ENTERED AND COPIES MAILED... U.S.C.A. AND DAVIS, J.

I, JOHN J. HARDING, ESQ.

NONE.

3/21/78

DOCKET ENTRIES - COURT OF COMMON PLEAS

DOCKET ENTRIES

IN THE COURT OF COMMON PLEAS

TRIAL DIVISION - CRIMINAL SECTION

COUNTY OF PHILADELPHIA

COMMONWEALTH	:	1966 NOVEMBER
VS.	:	190 - MURDER
JOHN SULLIVAN	:	193 - MURDER

MAY 22, 1967 - COURT ROOM 653
PRESIDING HON. ALEXANDER BARBIERI
DEFENDANT PRESENT WITH HIS COUNSEL.
UPON BEING ARRAIGNED STANDS MUTE.

THE COURT ORDERS A PLEA OF NOT GUILTY TO BE ENTERED AS TO BOTH BILLS, ON BEHALF OF DEFENDANT.

A JURY BEING DULY EMPANELLED, SWORN AND AFFIRMED, THE TRIAL PROCEEDS:

JUNE 19, 1967 - VERDICT:
190 - GUILTY OF MURDER FIRST DEGREE
193 - GUILTY OF MURDER FIRST DEGREE

AFTER FURTHER DELIBERATION, THE JURY FIXED THE PENALTY AT LIFE IMPRISONMENT.

SENTENCE DEFERRED PENDING FILING OF POST TRIAL MOTIONS.

BARBIERI, J.

JUNE 21, 1967 - MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT FILED.

OCT. 19, 1967 - ORDER NAMING A COURT EN BANC FILED.

CARROLL, J.

COURT OF COMMON PLEAS DOCKET ENTRIES

JAN. 30, 1968 - ORDER FOR RE-ARGUMENT OF MOTIONS FILED.

BARGIERI, J.

JULY 15, 1968 - ORDER: AFTER ARGUEMENT AND RE-ARGUEMENT BEFORE THE COURT EN BANC - MOTION IN ARREST OF JUDGMENT -- DENIED.
MOTION FOR NEW TRIAL - DENIED.

HON. ALEXANDER BARBIERI
HON. STANLEY GREENBERG

JUDGE EDWARD BRADLEY DISSENTS THE DENIAL OF MOTION FOR NEW TRIAL.

AUG. 9, 1968 - AND NOW SENTENCE:
190 - TO THE STATE CORRECTIONAL INSTITUTION FOR THE REMAINDER OF HIS NATURAL LIFE FROM 11-3-66.

193 - TO THE STATE CORRECTIONAL INSTITUTION FOR THE REMAINDER OF HIS NATURAL LIFE. TO RUN CONSECUTIVE TO SENTENCE ON BILL 190 NOV 1966.

BARBIERI, J.

EO DIE:
WRIT OF CORAM NOBIS FILED.

SEPT. 10, 1968 - CERTIORARI FROM THE SUPREME COURT FILED, RETURNABLE THE 2ND MONDAY OF OCTOBER 1968.

OCT. 3, 1968 - WRIT OF CORAM NOBIS DISMISSED.

OPINION FILED.

BARBIERI, J.
GREENBERG, J.

OCT. 4, 1968 - OPINION FILED.

BARBIERI, J.
GREENBERG, J.
BRADLEY, J.

DEC. 29, 1971 - JUDGMENT OF SENTENCE AFFIRMED BY THE SUPREME COURT OF PENNSYLVANIA.

OPINION FILED.

JUSTICE POMEROY

DISSENTING OPINION FILED. - JUSTICE ROBERTS

JAN. 10, 1972 - PETITION FOR REHEARING BEFORE SUPREME COURT FILED.

COURT OF COMMON PLEAS DOCKET ENTRIES

FEB. 22, 1972 - PETITION FOR REHEARING DENIED BY SUPREME COURT.

FEB. 23, 1972 - REMITTITUR - JUDGMENT OF SENTENCE AFFIRMED BY THE SUPREME COURT OF PENNSYLVANIA

OCT. 30, 1973 - PETITION FOR POST CONVICTION RELIEF HEARING FILED.

- COMMONWEALTH'S ANSWER TO PETITION FILED.

JAN. 4, 1974 - ORDER: DEFENDANT GRANTED LEAVE TO FILE AN AMENDED PETITION POST CONVICTION. IF PETITION IS NOT FILED WITHIN 10 DAYS - PETITION IS DISMISSED.
BARBIERI, J.

FEB. 14, 1974 - ORDER: PETITIONER IS GRANTED LEAVE TO FILE AN AMENDED PETITION FOR POST CONVICTION RELIEF HEARING - ON OR BEFORE FEB. 15, 1974.
BARBIERI, J.

FEB. 27, 1974 - ORDER: COMMONWEALTH GRANTED A PERIOD OF 20 DAYS FROM THE FILING OF THE AMENDED PETITION, BY THE PETITIONER, TO REPLY THERETO.
BARBIERI, J.

APRIL 4, 1974 - AMENDED PETITION FOR POST CONVICTION HEARING FILED.

- COMMONWEALTH'S ANSWER TO AMENDED PETITION FILED.

NOV. 6, 1974 - AND NOW TO WIT: DEFENDANT IS HEREBY GRANTED LEAVE TO FILE NUNC PRO TUNC APPEAL TO THE SUPREME COURT OF PENNSYLVANIA AND TO FILE BRIEFS AND PRESENT ORAL ARGUEMENT THEREON.

PETITION FOR RELIEF UNDER THE POST CONVICTION HEARING ACT IS OTHERWISE DENIED.

DOTY, A.J.

EO DIE: OPINION FILED.
DOTY, A.J.

NOV. 18, 1974 - CERTIORARI FROM SUPREME COURT FILED. RETURNABLE FORTHWITH.
(DISTRICT ATTORNEY)

NOV. 22, 1974 - 2 CERTIORARIES FROM SUPREME COURT FILED RETURNABLE FORTHWITH.
(DEFENDANTS COUNSEL)

EXCERPTS FROM TESTIMONY OF G. FRED DIBONA, ESQUIRE
APRIL 24, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIALS DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN,	:	NUMBERS 190 and 193
Defendant		

POST CONVICTION HEARING ACT PETITION

Room 784, City Hall
Philadelphia, Pennsylvania

April 24, 1974 and
April 25, 1974

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

(MS.) MARILYN GELB, ESQUIRE and
JAMES M. MORAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

****

DIRECT EXAMINATION

BY MR. MORAN:

Q Judge DiBona, was there a time when you represented the defendant, John Sullivan?

A Yes, there was, together with Chuck Peruto.

Q Co-counsel was Chuck Peruto?

A Yes.

Q And Mr. Sullivan's case was tried and he

was found guilty; is that correct?

A That's correct.

****

****

Q There came a time during the course of the trial where the trial Judge decided to let the case go to the jury?

A Yes, sir.

Q And thereafter did you discuss with Mr. Sullivan and with Mr. Peruto whether or not you would present any evidence, specifically whether or not you would put Mr. Sullivan on the stand and whether or not you would put other witnesses on the stand?

A Yes, sir, we did have a long discussion.

Q Would you tell me about how long that discussion took?

A I would say the discussion as to whether Sullivan should testify or not took an hour and a half to two hours up in the cell room.

Q Is it correct in the beginning Mr. Sullivan wanted to testify in his own behalf?

A No, sir, that's not my recollection.

Q Did you want him to testify?

A Well, we had a lengthy discussion, as I say. Mr. Sullivan did not want to testify in his own behalf. I was of the opinion he should. Mr. Peruto was being the Devil's Advocate on both sides of it. Ultimately John Sullivan discussed the matter with his brother and other members of the family and made his decision that he would not testify.

THE COURT: You thought he should?

THE WITNESS: I thought he should, yes, sir.

BY MR. MORAN:

Q And you recommended that he should?

A Yes, sir. Very strongly.

Q Your Honor, there were times during the course of the trial that you made certain objections to certain evidence that was being introduced by the District Attorney. You had some discussions with the trial Judge, Judge Barbieri. Do you remember, sir, Judge Barbieri off the record making certain remarks to you to the extent that he was permitting the evidence in because he was convinced that the man would be acquitted?

MR. LUNKENHEIMER: Objection,

your Honor. I don't think that that type of testimony is relevant considering this case was tried by a jury and conviction found and an appeal was taken and the verdict was sustained on the sufficiency of the evidence.

THE COURT: I think, Mr. Moran you'll have to have more of a foundation for this type of testimony before you can proceed. I'll sustain the objection now without prejudice to your right to raise the question later if it becomes material.

MR. MORAN: Well, let me put it in another way, if the Court will permit.

BY MR. MORAN:

Q Did you convey to Mr. Sullivan during the course of the conversation when you were attempting to decide whether or not he would take the stand that Judge Barbieri had told you on numerous occasions off the record that there was insufficient evidence to sustain a conviction?

A I did, sir.

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: That I'll overrule.

BY MR. MORAN:

Q And you did tell Mr. Sullivan that during your conversation with him as to whether a case should be presented?

A Yes, sir, I did.

Q And you were convinced at that time that there was insufficient evidence; is that correct, sir?

A I was convinced in the very beginning of the case there was no evidence of any kind, character or description from which he could be convicted.

Q And you were convinced that Judge Barbieri felt that way himself?

MR. LUNKENHEIMER: Objection, your Honor. He's calling for Judge DiBona to show the state of mind of Judge Barbieri.

THE COURT: I'll sustain the objection.

BY MR. MORAN:

Q Would you tell us what Judge Barbieri said to you with respect to that?

MR. LUNKENHEIMER: Objection. Judge Barbieri is as available as Judge DiBona.

THE COURT: I'll sustain that. You may ask the witness what he told the

defendant. That you can ask.

BY MR. MORAN:

Q Would you be more specific with respect to what you told the defendant, sir?

A Yes, sir. From the very outset of the trial of this case we had 30 or 40 conferences on rulings on evidence, and the like, and in each and every one of them we were overruled, the defense was, although on almost every one of them Judge Barbieri said we were undoubtedly right.

MR. LUNKENHEIMER: Objection, your Honor. It's again the hearsay statement that I objected to before.

THE COURT: No, we're getting to what he told the defendant. So I'll overrule that. Proceed.

THE WITNESS: Judge Barbieri said on at least 20 occasions during the course of this trial, "Fred," as he called me during that period, "there is no doubt in my mind the defendant will be acquitted. We might just as well give the District Attorney his full rope and let him try the case to his heart's content, let everything in, and he'll be acquitted in any event."

He said that at least 20 times during the course of the trial.

BY MR. MORAN:

Q In the beginning, sir, did you come to the conclusion that Judge Barbieri --

THE COURT: Now you told this to the defendant?

THE WITNESS: Yes, I told Mr. Sullivan. That's right, sir.

BY MR. MORAN:

Q And after these conversations with Judge Barbieri, sir, did you come to the conclusion that he was not going to let the case go to the jury?

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: Well, again I'll sustain that. We are only concerned at this point, Mr. Moran, with what he told the defendant.

MR. MORAN: If your Honor please --

THE COURT: Now after you've got a proper foundation here you can ask the question like this. But at this point there is no foundation for it.

MR. MORAN: Well, may I make an offer of proof, sir?

THE COURT: All right.

MR. MORAN: Judge DiBona made a tactical decision with respect to whether or not to present testimony or not in this particular case.

THE COURT: Well, we haven't got to that point yet.

MR. MORAN: That's why I'm giving you an offer of proof, sir. Maybe we'll save a little time with these objections.

THE COURT: All right.

MR. MORAN: Part of the reason why Judge DiBona made this decision was made upon the statements made to him by Judge Barbieri. Since it's obvious that Judge DiBona's decision with respect to this tactical move was based on that, we must know his motives, why he did it.

THE COURT: Well, first, before you get to that point, you have to get into the record what was done. In other words, you're saying that your offer is

to include counsel for the defense's decision not to present testimony. Now, first, you have to determine what testimony was not presented and then you go to the reason for it.

MR. MORAN: I thought we just established, sir, that there was no testimony presented. Judge DiBona just testified to it.

THE COURT: Well, you have to say that. We don't know that there was no testimony. We know that the defendant said that he didn't want to testify. The defendant said that but not as to other testimony.

MR. LUNKENHEIMER: Your Honor, I would further object in light of the fact that the case law in this Commonwealth indicates that the Supreme Court of this State will not review with hindsight the tactical decisions —

THE COURT: Oh, I know Washington v. Maroney. If you're objecting to his offer of proof I'll overrule it, again permitting you to argue at the conclusion

of the case.

MR. LUNKENHEIMER: Yes, your Honor.

BY MR.MORAN:

Q Was there any testimony at all offered in the defense for John Sullivan?

A No, sir, there was not.

Q Getting back to Judge Barbieri --

THE COURT: Now you can ask him, if you wish to, why there was no testimony offered.

BY MR. MORAN:

Q Why, sir?

A Well, at that point, first of all, the case was going to the jury. No doubt about that. And I don't know that Judge Barbieri indicated otherwise. His indications were that he was going to send it to the jury and the jury was going to find him not guilty. He was convinced in his own mind that the evidence was insufficient to convict, and so stated.

MR. LUNKENHEIMER: Your Honor, I would move to strike that unless that was in some way related to the defendant directly and we're speaking about a specific conversation.

THE COURT: Well, I'll overrule your objection because he's given the reasons.

THE WITNESS: I'm talking about the discussions I had with my client.

THE COURT: Proceed.

THE WITNESS: Judge Barbieri was convinced that the evidence, and so stated, made it very clear and was convinced the evidence was insufficient to warrant a conviction and felt the jury would acquit. However, when the case was going to the jury despite that feeling that had been conveyed to me by Judge Barbieri, we had a discussion as to whether we should put on a defense or not. As I said earlier, it was my opinion that John Sullivan should testify and explain his presence in the building, which was really the only evidence the Commonwealth had, the only legal evidence or legally competent evidence that they had. This was a situation where I felt that a man was being convicted just because he happened to be in a building at the wrong time. And that was the only evidence they

had. However, once John Sullivan decided he would not testify there was no other real good evidence that we had, that I thought should be offered.

BY MR. MORAN:

Q All right. Now would you say that the chief witness for the Commonwealth was a man by the name of McGrath?

A Yes, sir.

Q And he made certain statements attributed to another so-called defendant that was admitted against John Sullivan; is that correct?

A That's correct, sir.

Q And when you made or when the decision was made that there would be no evidence presented, were you aware that there was a witness, a man by the name of Hessian, who could have testified that the Commonwealth's chief witness, McGrath, had told him a different story with respect to what happened that night?

A Yes, sir, there was evidence of that. And we discussed with Mr. Hessian at that time, Mr. Peruto and I did, during the course of the trial his being a witness. We concluded that he would be of no value to us as a witness. He either left the Union at that time

or was about to leave the Union. He had some problems up there and he was afraid for his own life, as he said to us, and that he didn't want to get involved. And based on that we made a tactical decision that there'd be no sense calling him.

Q Did you subpoena him?

A We had talked to him. I don't know whether we actually issued a subpoena, a formal subpoena or not.

Q There again, when you made the decision not to call Mr. Hessian, was that decision also based upon the allegations made to you by Judge Barbieri with respect to his opinion concerning the sufficiency of the evidence against this defendant?

A No, sir, it was not. By that stage of the game, Mr. Moran, and I'm saying this about a fellow Judge, I had lost faith in Judge Barbieri as a trial Judge in that case. I kept telling Judge Barbieri, and I discussed this with John, "Judge Barbieri, you keep telling me, 'Well, let's give Dick Sprague his full road, you'll be acquitted.'" And I know at least six, seven occasions I said, "Judge Barbieri, you keep letting this nonsense in on the theory he's going to be acquitted and pretty soon you're going to have enough nonsense here so you're ruining a man's life."

There were a lot of decisions that were discretionary. The color slides, which were an important part of the Commonwealth's case, which I think were the worst slides I've ever seen, I think they had absolutely no relevancy in this case. And the Supreme Court in a three-to-three decision sustained it. The abuse of discretion was exercised on the theory that he might offend Mr. Sprague --

MR. LUNKENHEIMER: Objection. I doubt whether Judge DiBona can tell what was in Judge Barbieri's mind.

THE WITNESS: I know what was in his mind. He told me.

MR. LUNKENHEIMER: You didn't testify as to that.

THE WITNESS: He told me point blank that he thought the slides were improper but that Dick Sprague wanted them, so we'll let them in.

BY MR. MORAN:

Q As a matter of fact, sir, didn't Judge Barbieri say he wished he could keep the slides out?

A I don't recall specifically him saying that, no.

Q Now, sir, is it your opinion then, sir,

that Judge Barbieri let a lot of this testimony in not because he thought it was relevant or material but because in his opinion there was insufficient evidence to sustain a conviction?

MR. LUNKENHEIMER: Objection to the question as phrased. He's asking only for the Judge's opinion as to what Judge Barbieri did, and that is not proper.

MR. MORAN: I didn't ask that, sir. I didn't ask him his opinion as to what Judge Barbieri did. I asked him what his opinion was of the decision made by Judge Barbieri.

MR. LUNKENHEIMER: And his opinion is not relevant --

THE COURT: Well, I think that's objectionable. I'll sustain that.

BY MR. MORAN:

Q One of the other defendants in this case was a man by the name of Carchidi. At the time of the Sullivan trial did you represent Carchidi, the co-defendant?

A Yes, I did.

Q And Carchidi was eventually tried, was he not?

A Yes, sir.

Q Did you try his case?

A Mr. Peruto and I were co-counsel in that case In that case he was acquitted.

Q Did Mr. Hessian testify in that case?

A No, sir, I don't recall him testifying. I have no recollection of it.

Q You don't remember?

A No.

Q Now did you become aware some time during the Sullivan trial that a Detective McGill -- I think his nickname was Smokey, Smokey McGill -- had some notes that he had made after an interview with McGrath that contradicted McGrath, who was the Commonwealth's chief witness?

A I have a recollection of that, yes, sir.

Q And were you aware of a Detective McGowan, who also had some information that contradicted McGrath?

A I heard that, yes, sir.

Q And were you aware of a Detective Duffy who had some evidence that contradicted McGrath?

A Well, was I aware that he had some evidence or was I aware that there was a story around he had some evidence?

Q Either one.

A The latter, yes.

Q Did you ever make an effort to locate the so-called statements taken by McGill -- McGrath. Excuse me -- McGill, McGowan and Duffy which purportedly contradicted McGrath?

A As I say, Mr. Moran, I have not reviewed this record some six or seven years. Six years. I have a recollection we did attempt to get some information with respect to that, and my recollection is that we were unable to.

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Q Getting back to Officer McGill for the moment, sir, was it during the course of the trial that you received certain information that McGill may have

information that contradicted McGrath?

A I can't recall specifically. I think it was during the trial. But at what portion of the trial or where it was in the trial, I don't recall.

Q Do you remember, sir, if you ever asked Mr. Sprague, the District Attorney, to produce that so-called evidence that you had heard about?

A I'm sure we did. I don't recall specifically, but I'm sure we did.

Q Did Mr. Sprague ever produce that, sir?

A No, sir.

Q Do you know if that evidence was produced in the Carchidi case?

A I don't recall specifically. No, sir.

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And, your Honor, I have another fact that I forgot to mention in my discussion with Sullivan as to whether or not he should take the witness stand or not.

THE COURT: Well, I'll ask you. Was there anything else that you discussed with Mr. Sullivan with reference to his taking the witness stand?

THE WITNESS: Yes, sir. I wanted him to take the witness stand for one very important reason. The only problem, as I said earlier, the only evidence that they had was the fact that John Sullivan was in the building that night when these murders were in fact committed. And I thought his explanation of why he was there would be very forceful. He was there, he made a phone call, a long

distance phone call and had made it on a collect basis, person to person. And I thought that would be very strong for a jury: A man about to commit two murders would not pick up the phone and say to the operator I'm John Sullivan, please get me person to person so-and-so. That's just inconsistent with reasonable conduct. You know, you don't make a phone call and give your name two minutes before you're going to commit a double murder. And I thought he should take the witness stand for that very purpose.

THE COURT: Did you tell him that?

THE WITNESS: Yes, sir.

BY MR. MORAN:

Q Judge DiBona, you said that you represented one of the co-defendants in this matter along with Mr. Sullivan. Did you also represent a third defendant?

A Yes, sir.

Q So you represented all three?

A All three of them.

Q And both you and Mr. Peruto represented all three?

A Yes, sir. We were associate counsel in all three cases.

Q And did you know, Your Honor, that there was a witness by the name of Tony Salvatori who alleged that he called the deceased, Rita Janda, that he had called the deceased at 7:40 P.M. on the night when she was killed, and the Commonwealth's evidence was that she was killed at 7:15?

A I remember some such story. But there was no merit to it in any event.

Q No merit to what?

A To that witness's recollection. I think there is one thing clear, that the two people were called around 7:15. If my recollection is that that was clear; that the killings occurred before this witness allegedly spoke to Miss Janda.

Q Did you personally speak to this witness?

A I don't recall, sir.

Q Well, wasn't one of the serious issues in this case, sir, the time of death?

A Yes, sir.

Q Didn't the Medical Examiner contradict himself when he said on two occasions the time of death was on two different times?

A I don't recall specifically. There was

some discussion of the time of death.

Q Are you saying now that you're convinced it was 7:15?

A My feeling was that the deaths occurred at a time when John Sullivan was in the building.

Q Well, do you remember?

A Carchidi and McGrath were also in the building at the time the shootings occurred. There were gunshots heard. And my recollection now it was 7:15. As I said, I mean I've not seen this record for about six or seven years.

Q Well, see if I can refresh your recollection.

A I did not know I was to testify, Mr. Moran, until -- was it yesterday morning you so advised me?

Q Well, I think I first spoke to you earlier in the week, sir.

A Tuesday, maybe. Well, today is Wednesday. It's either Monday or yesterday.

Q I know that. That's why I'm going to attempt to refresh your recollection. The Medical Examiner filed the report and he said in his opinion that death occurred some time between 9:00 P.M. and 3:00 A.M. in the morning.

A Yes, sir. Give or take an hour or so.

Q And then at the trial he was asked by the

District Attorney if it could be as early as 7:15 rather than nine. Do you remember that?

A Yes, sir.

Q And you cross-examined him extensively on that. Do you remember, sir?

A Yes, sir.

Q And you said that you're contradicting yourself. Do you remember that?

A Yes, sir.

Q Well, now, wouldn't that lead you to believe there was some confusion about the time of death in this case?

A Not that alone, no. The fact that I cross-examined him to attack his credibility does not indicate my belief one way or another. I owe a responsibility to my client to make a witness look inaccurate no matter what I think the accurate situation is.

Q All right. If the Medical Examiner said in his report that in his opinion death occurred between 9:00 P.M. and 3:00 A.M. and then later changed it to, say, it could have been as early as 7:15, what makes you so convinced that it was 7:15? Isn't that a discrepancy, sir?

MR. LUNKENHEIMER: Your Honor,

I'm going to object to the line of questioning. There is no relevance to --

THE COURT: All right, I'll sustain that.

MR. MORAN: What was that, there is no relevance?

THE COURT: I have sustained the objection.

BY MR. MORAN:

Q At the time of the Sullivan trial, sir, did you have any evidence that at the time of the killing of these two people there was money taken?

A There was no evidence of that, sir.

Q No evidence of that?

A No, no suggestion of that.

Q Were you aware that there was some indication in the Carchidi trial that money was taken?

A I have no recollection of that, sir.

THE COURT: Do you mean money taken by whom, by the defendants, you mean, or by someone else?

MR. MORAN: By whoever killed these people.

THE WITNESS: I have no recollection of that. This was not tried

on the basis of a Felony Murder. I don't think there was any evidence of a Felony except the actual killing. In the Carchidi trial I'm sure that was not an issue.

MR. MORAN: I have no further questions.

THE COURT: Mr. Lunkenheimer.

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THE COURT: Well, let's get on with the testimony.

MR. LUNKENHEIMER: The Commonwealth has no further questions, your Honor.

THE COURT: I'll ask one or two questions.

Were you prepared to try this case?

THE WITNESS: Yes, sir.

THE COURT: And did you consult with the defendant on each step of the proceedings?

THE WITNESS: Yes, sir. My consultation with the defendant was not difficult. It was with the trial Judge I had my problems with. We consulted with him during trial, we were allowed to meet with him in the cell room after trial and before trial, and during lunch. Yes, sir, we had full consultation with our client at all times.

MR. LUNKENHEIMER: If I may, your Honor.

BY MR. LUNKENHEIMER:

Q In your opinion, was there any conflict between your defense of this defendant and the other two defendants who were tried at subsequent dates?

MR. MORAN: I object to that, your Honor.

THE COURT: I'll overrule that.

THE WITNESS: I saw no conflict.

BY MR. LUNKENHEIMER:

Q In terms of the timing of the presentation of this case to the Supreme Court, was the delay due to any fault on the part of yourself or Mr. Peruto?

A Without reviewing the record I would not be able to answer that, in all honesty.

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EXCERPTS FROM TESTIMONY OF A. CHARLES PERUTO, ESQUIRE
APRIL 24, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIALS DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN, Defendant	:	NUMBERS 190 and 193

POST CONVICTION HEARING ACT PETITION

Room 784, City Hall
Philadelphia, Pennsylvania

April 24, 1974 and
April 25, 1974

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

(MS.) MARILYN GELB, ESQUIRE and
JAMES M. MORAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

A. CHARLES PERUTO, Attorney at Law, duly sworn.

DIRECT EXAMINATION

BY MR. MORAN:

Q Mr. Peruto, were you co-counsel with Judge DiBona in the representation of John Sullivan?

A Yes, I was.

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THE COURT: Mr. Peruto, let me ask you this: Were you counsel at the time

of --

THE WITNESS: Carchidi?

THE COURT: At the time of the filing of the appeal to the Supreme Court in the argument.

THE WITNESS: I don't know anything about the filing of it with the Supreme Court. I do know, to my recollection, that there was no argument.

THE COURT: I see by the record here that the Supreme Court did have the matter. I'm wondering whether this matter of this communication was ever presented to the Supreme Court. Do you have knowledge of whether it was or whether it wasn't?

THE WITNESS: No. My recollection was I had spoken to John Sullivan in prison, and Mr. Sullivan's family was communicating with me, and I was after Judge DiBona to file the brief or to give me the brief or give me something that could be filed. And I can recall that Mr. Sullivan himself was very upset over it, and I was too. And I constantly was calling Mr. DiBona saying that we have to have the brief.

Now upon later speaking to Judge Di Bona he tells me that there was some sort of draft sent to my office.

THE COURT: Well, he testified to that.

THE WITNESS: And I'm assuming that someone in my office might have done something about it. But I have absolutely no recollection of the Supreme Court ever getting anything on behalf of John Sullivan.

BY MR. MORAN:

Q Mr. Peruto, you never filed the brief on behalf of Mr. Sullivan with the Supreme Court?

A No, sir, I did not.

Q And at the time the matter went to the Supreme Court it was you who represented him since Judge DiBona was then on the Bench; is that correct?

A Well, I did not represent him beyond the trial. But it was my understanding from what Judge DiBona had told me that he did prepare a brief. And I thought that his successor in his private office might have been carrying that on in his behalf. But there I have to say that if the record indicates that I had further duty to John Sullivan at the conclusion of the trial, then I'd have to say I, too, am remiss because

I did not file on behalf of John Sullivan, and I'm embarrassed to say so.

Q Thank you, sir. I appreciate your being candid. Your appearance does appear, sir, in the record of the Supreme Court, which I'm reading from. It says, "For appellants, G. Fred DiBona and A. C. Peruto And Judge DiBona's name is written out. So apparently you did enter an appearance.

A Apparently somebody did enter an appearance. I have no recollection of my entering it myself.

Q So you never filed a brief, and I suppose you never orally argued the case before the Supreme Court?

A I never did anything for John Sullivan, which will go down to the day I die, because I, too, felt that it was the worst case in my life of an unfair conviction.

Q So that nobody did anything with respect to filing a brief or arguing this case before the Supreme Court on behalf of John Sullivan?

MR. LUNKENHEIMER: Objection, your Honor. He cannot testify to all the other lawyers in the City of Philadelphia.

THE COURT: I'll sustain that. If you ask him to his knowledge - -

MR. MORAN: All right.

BY MR. MORAN:

Q At least there were two attorneys who entered their appearance on this case, and as far as you know neither one did anything with respect to filing a brief for oral argument before the Supreme Court.

A I can only answer you this way, I didn't. I thought somebody else did. And I'm terribly embarrassed that nobody else did.

Q Now with respect to the Motion for New Trial in Arrest of Judgement that was filed in the lower court, sir, would you tell me why that you and Judge DiBona did not raise the issue of this secret communication between Mr. Sprague and Judge Barbieri?

A No, I can't answer that. It was prepared by Mr. DiBona at the time. I just don't know why that was not. It may have been an oversight because it occurred so early in the trial. But, however, that was formulated by the then Mr. DiBona. I don't know.

Q You also represented the other two defendants in this case; is that correct, sir?

A The other two I tried. I was trial counsel. Mr. DiBona was trial counsel for Mr. Sullivan.

Q And they were both acquitted; is that

correct?

A Yes, sir. Yes, they were. And it is correct that they should have been.

Q During the course of the Sullivan trial, did you receive information, sir, that a Detective McGill had taken a statement from Mr. McGrath, who was the Commonwealth's chief witness, and in that statement each contradicted what he said on the witness stand in the Sullivan matter?

A Not in that language. I'll have to explain, if I may.

Q Well, you can rephrase it.

A It appeared to me that when McGrath testified he was too pat, if you know what I mean, a feeling that you get as counsel, that he was too sure of the exact words. It appeared to me that in the heat of excitement, something that suddenly erupted, the hearing of shots while he's washing a wall in the conference room of Local 107, and everything happening so suddenly, it appeared to me that nobody could remember the exact words. So I was suspicious that he may have been rehearsed in how to say those words. So that was the indication, if such be an indication. I, therefore, pursued the matter and asked who questioned him. This was something that had been denied us in the Sullivan

case. In the case of Carchidi there was an objection, but the Court told the Commonwealth witness to answer the question. Following that I obtained the information that McGrath was questioned by Detective McGill. I caused McGill to be produced in court with his original handwritten notes. And they disclosed that there were several different versions of what had been said in that conference room by McGrath. And they were so widely divergent to each other that they could have been interpreted completely consistent with innocence of Carchidi was well as with guilt of Carchidi. And it appeared from them that the only thing presented by the District Attorney at the trial of Carchidi was the version which came out last which indicated some implication of Mr. Carchidi in the crime. I can recall very vividly at the time saying to Judge DiBona, "If only we had this information in the Sullivan case." And I said that to Mr. Carchidi, I recall, and later on to Mr. Sullivan in prison, "If only we were permitted to know even the detective's name by Judge Barbieri we could have subpoenaed this information for you and I'm sure it would have worked your acquittal as well."

Q What influence do you think it had on the acquittal of Carchidi?

MR. LUNKENHEIMER: Objection, your

Honor.

THE COURT: I'll sustain that.

BY MR. MORAN:

Q You said this was denied. I'm not quite sure if I understand what you mean by that. Are you saying that you requested from the District Attorney the information that McGill allegedly had?

A I'm saying that I didn't request the information in Sullivan's case about information that McGill had because I didn't even know McGill was the one who had it. We were precluded from even finding out what Detective could give us the information we wanted.

Q How were you precluded?

A By asking the Commonwealth witnesses in Sullivan's case on cross-examination who was it that interviewed McGrath or who had obtained statement of McGrath or who was it that recorded what McGrath said upon questioning. And all of that we were precluded from finding out. It was our intention in the Sullivan case if we could find out who it was that questioned McGrath, maybe we could question those people and get their original notes to find out if what McGrath was saying in the Sullivan trial was actually true or something that was twisted around.

Peruto - Direct

Q Did you specifically ask the District Attorney or the trial Judge for that information that McGill allegedly had in his possession?

A No. There was no way of formally asking for specific information or who the detective would be. In other words, we were kept so totally in the dark and not having supplied that there was even something that was helpful to John Sullivan, that we didn't even know enough information to seek information.

Q What I'm confused about, sir, and I'm trying to get at is, what was it that you were denied and by whom with respect to --

A Oh, I understand you. Judge Barbieri cut us off in the questioning either by objection -- I don't recall exactly what it was. But my recollection today is, and, of course, I can't give you word for word, but my recollection today is that during the trial when we sought the information whereby we could compare what McGrath was saying in trial to what he said immediately after the killing to the detectives, that we were cut off and denied any access to that information by the rulings of Judge Barbieri.

Q And did you feel that this information might have fallen within the framework of the Brady case?

Peruto - Direct

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: Sustained. You can argue that later.

THE WITNESS: Can I, Judge?

THE COURT: No.

BY MR. MORAN:

Q Aside from Detective McGill, during the Sullivan trial did you know that McGrath was questioned by a Detective Duffy and a Detective McGowan?

A McGrath was guarded closer than the fortunes of Fort Knox. No one could get near him. He was around the clock, every place he went, with detectives. We weren't permitted to even interview McGrath. I even complained about that. I said that a witness is a witness, not a witness for the Commonwealth or a witness for the defense. I said one side or the other may be favored by calling, but the man is a witness. Couldn't get near McGrath.

Q When did you first become aware then that McGrath -- excuse me -- that McGill had some information that might contradict McGrath?

A In the Carchidi trial.

Q How, sir?

A Because the Judge in the Carchidi trial

ruled that we should get the information as to who it was who interviewed McGrath. And we fell into it like a bonanza when we learned that it was McGill and that McGill still had his original notes and there the original notes were that showed they were many different statements made by McGrath. But there was no way of knowing that at the time of the Sullivan trial, because of the rulings made in Sullivan's case.

Q Are you saying then that you made the same specific request in the Sullivan trial that you made in the Carchidi trial for that information?

A Now whether we made the specific request at a particular time, I really cant recall. I do know that we sought it, whether it was in chambers or on record or somewhere or another. I do know that we sought it because I still had it in line to keep seeking it at the time of the Carchidi trial. There was still more objection. But we got it that time. And I can recall saying if we only had this at the Sullivan trial he'd have been acquitted too.

Q What was the position of the Sullivan appeal at that time when you decided that if you had had that information you might have been able to win the Sullivan case? Where was his appeal at that time?

A I don't recall. But I don't even think that

this Motion for a New Trial was disposed of yet.

THE COURT: Did you raise it on the motions?

THE WITNESS: I can't even recall that, Judge.

BY MR. MORAN:

Q Well, it's a matter of record. It was not raised.

A Well, then, if it was not raised I'm remiss in not having DiBona raise it, because I'm not familiar with that.

Q Now what was it in the McGill statement that would have had a bearing on the Sullivan trial, specifically?

MR. LUNKENHEIMER: Objection, your Honor. I don't think that that particular question calling for information that was sought at time of trial is relevant. We don't make decisions ex post facto upon what was revealed the decision --

THE COURT: Well, I don't think you're right and I don't think Mr. Moran is right. But it's already been covered. They wanted to impeach the testimony of McGrath.

MR. MORAN: I wasn't sure that was made clear.

THE COURT: That's made clear. I'll sustain the objection, but not for the reason you've given.

MR. LUNKENHEIMER: Thank you, your Honor.

BY MR. MORAN:

Q When did you first become engaged to represent John Sullivan?

A It would have to be some time after he was in prison, that is after the inquest. Exactly when, I don't recall. I do recall there being a Dessis problem, that he was never given any notice of the Grand Jury to which his case would be presented. So I know that that was raised and that leads me to conclude that our representation was after that.

MR. LUNKENHEIMER: Objection, your Honor --

THE COURT: Don't get so excited.

MR. LUNKENHEIMER: I'm sorry. I was anticipating.

THE COURT: Never anticipate Mr. Peruto.

THE WITNESS: What I meant by

that, it must have come afterward because I am certain if we were in it before, we would have raised that issue before what the District Attorney did to him at that time.

BY MR. MORAN:

Q Now in the Carchidi trial, did a Mr. Michael Hessian testify?

A I don't really recall. I'm trying my best to recall. It seems to me that he did.

Q Well, if you can't remember maybe I can refresh your recollection. Do you remember him testifying and contradicting McGrath?

A I seem to have some recollection that Mike Hessian told us that he spoke to McGrath soon after the killing and that McGrath had said something different to Mike Hessian than what McGrath said at the trial. Now I do recall being interested in having Hessian say that in the Carchidi trial. Now I'm trying to focus it in my mind. And I, therefore, think that he did testify because I felt that he would be an important enough witness that he should testify. The thing that causes me to waiver is the fact that I recall also that there was a power struggle, so to speak, going on in Local 107 where people were meeting with strange

accidents who wanted to run for office and that everybody connected with the officers or hierarchy of the Union was a little bit afraid to take the side of one faction or another. I do know that Mr. Hessian was terribly frightened at the time of the Sullivan trial and we didn't want to put on another witness who we could not rely on a hundred percent. But I think that by the time Carchidi did come to trial, Hessian did testify. But I can't be a hundred percent sure of that.

Q Do you mean to say he wouldn't testify in the Sullivan trial but he testified in the Carchidi trial?

A Well, the heat was a little less hot by the time Carchidi came to trial.

Q Well, at any rate you had made a decision not to present any testimony anyway, hadn't you?

A In the Sullivan trial?

Q The Sullivan case, yes.

A Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that -- and we communicated this to Sullivan --

THE COURT: When you say great discussion, you mean lengthy discussion?

THE WITNESS: Lengthy discussion, yes, sir. Where we felt that he couldn't

possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.

BY MR. MORAN:

Q Wait --

A And I'm afraid Sullivan suffered by that fact.

Q Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided between themselves which of us they wanted to be chief counsel. John

Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried.

Q Thank you. Now is it a fact that you recommended to John that he take the witness stand or did you not, or were you just playing the part of the devil's advocate?

A No. I can recall that he should testify strictly on the basis that a jury -- but it's difficult to get a man acquitted where the jury doesn't hear from him. On the other hand, there were some things in the personal life of John Sullivan that may have come out on cross-examination. For example, that phone call that was discussed by Judge DiBona. I was sure in my heart that Richard Sprague would follow through and ask him all about that call just for the purpose of embarrassing him as a married man having a girlfriend someplace else. And that I thought might hurt Sullivan more than the benefit that he would get out of putting the testimony on. But it was a value judgment. And I do recall bandering it back and forth. However, Fred

DiBona, if I can recall, went in the other direction. And you know, I'm not even sure now which of the two of us was pushing for him to testify or was pushing the other way. I'm even mixed up on that. But I do recall that Fred DiBona felt that there was not enough for it to go to the jury in the first place to result in a conviction. I do recall that we were both worried about it because of Judge Barbieri's constant statements, as Mr. DiBona testified to. And I do recall it was that sort of atmosphere, because Judge DiBona was so shocked by the conviction that I had to argue the penalty phase. He couldn't even speak to the jury.

Q Well, Judge DiBonn said that he urged the defendant to take the witness stand.

A Well, if that's his recollection, I'll have to say I can't refute it in my recollection.

Q Well, I want to know if it was you who urged him not to testify.

MR. LUNKENHEIMER: If anyone.

MR. MORAN: If anyone, naturally.

THE WITNESS: Since I don't recall, I'll put it this way: Which of the two of us urged him to testify or did not, or whether I did it as a result of

being sort of a devil's advocate -- I represent him regularly, Judge -- I would say that I would accept Judge DiBona's recollection. And it does seem to my recollection more in keeping with what I would have done because of the other two defendants yet to testify.

MR. LUNKENHEIMER: I'd move to strike that, your Honor, as mere speculation on the witness based on his own testimony.

THE COURT: I'll deny that. And you can argue it at the conclusion of the case.

BY MR. MORAN:

Q Did you know anything about this so-called Tony Salvatori who eventually called Rita Janda, one of the deceased in this case?

A Yes, I can recall something like that.

Q Now when you had a discussion with the defendant and with Judge DiBona with respect to whether he should or should not testify and whether or not certain evidence should be presented in his behalf, did you advise him that there was a certain Tony Salvatori who could offer testimony which might assist

him with respect to acquittal? Did you make the defendant aware of that?

A I don't think so. And I'll tell you why. The time of death had to be contrasted with the time of the phone call where Rita Janda had to have been spoken to. Now I don't recall what time it was, what the time limits that was set by the Medical Examiner where he fixed the time of death. I do recall that it was greatly in dispute. My recollection differs with Judge DiBona in that regard. I do recall that it was greatly in dispute. And the reason why I recall that it was in dispute is that I think that we obtained some information that Rita Janda and John Gorey, the decedents, had had dinner at the Schmidts Brewery Town Tavern. And I can recall saying that it could not have been that early, the killing, because they'd had dinner and the stomach contents, according to the Medical Examiner's report, showed a state of digestion which would be inconsistent with so early a death.

Q Well, you don't recall telling the defendant during the conversation with respect to whether or not you had presented a defense, that there was a witness by the name of Tony Salvatori?

A I don't recall whether I told him, in all honesty, but I know I told him I do think the witness

would be immaterial because the death could not have occurred that early anyhow and all we'd be doing was refuting the witnesses time of death. We were caught by surprise by the Medical Examiner refuting his own time of death and moving it up a couple of hours.

Q Did you tell the defendant that you had evidence that the two deceased had had dinner or drinks at the Brewery Tavern rather than in a diner that a Commonwealth witness testified to?

A I don't recall telling him that.

Q You don't recall telling Mr. Sullivan that?

A No.

Q Of course, if you had that testimony they were in the Brewery Tavern and not in the diner, that would have contradicted one of the Commonwealth's witnesses, wouldn't it?

A Oh, certainly.

Q And you don't remember telling the defendant that?

A No, I don't.

Q Do you remember there were allegedly three witnesses who were outside the 107 office building at the time of the alleged shooting that were standing by the window waiting for a 7:30 meeting? Do you remember having information with respect to those witnesses?

A Just this moment, during the asking of the question, I seem to recall something about witnesses having seen someone drive off with a flat tire, or something like that, and having heard shots from below the window where Gorey and Janda were.

Q You had an investigator by the name of Bill Christine investigate this case for you?

A Yes.

Q Do you remember him submitting a report to you saying there were three witnesses outside the Local 107 Headquarters who did not hear any shots?

A Yes.

Q Did you advise the defendant Sullivan when you were considering whether or not to put on a defense that these three witnesses were available and could help this defense?

A I don't recall advising him of that, but I do recall that I felt that it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross-examination of those witnesses in Sullivan's case.

Q So it might have hurt one of the other defendants that you represented?

A Yes, sir. And there a matter of judgment in the sense that we felt that the only thing that they had was the mere statement of McGrath and that the case would not even go to the jury.

MR. MORAN: Your Honor, can we take a couple of minutes break? The defendant has to go to the bathroom.

(WHEREUPON THE COURT TOOK A SHORT RECESS.)

CONTINUING DIRECT EXAMINATION

BY MR. MORAN:

Q Mr. Peruto, during your discussions with Mr. Sullivan and with Judge DiBona with respect to whether or not a defense would be presented, do you remember if you told the defendant that Mr. Hessian could testify and his testimony would contradict that of McGrath?

A No, I don't recall that being conveyed one way or another.

Q Who was it who made the ultimate decision, number one, not to have John Sullivan testify and, number two, not to present any evidence at all in his behalf?

A Well, it would have to have been Judge DiBona, and I'll tell you why. Although it appears that I'm co-counsel in the case of John Sullivan, such

was not completely the correct statement. The three defendants were together in the cell room when we were ready to go to trial. And the three of them were told now this is the situation, one of us will be permitted to do the cross-examination and the summations and the actual handling of the case. You're going to have to choose between us or any other lawyer of your choice. Sullivan indicated the desire that Judge DiBona was older and more experienced and he elected to have Judge DiBona try his case. The other two defendants elected to have me try their case. Judge DiBona and I then agreed that whichever of us would be selected to try the case the other of us would assist, but not in the sense of being coequal but merely to assist such as, you know, get papers ready or something like that.

Q And it's your recollection that it was Judge DiBona who made the decision and not the defendant?

A It's not my recollection as much as it is my statement that it would have had to have been him.

Q Well, you did enter your appearance at the trial along with Judge DiBona.

A I'm sure that I appeared at the trial. Whether it was a formal entry or not I can't recall. But I guess it would be tantamount to the same thing.

Motion in Arrest of Judgment for New Trial in the lower court there was no points raised with respect to some probable errors in the Court's charge?

A No, I can't. Everything was done in a very fast clip in the sense that what was done -- I don't mean that there wasn't sufficient time. What I mean by that is I would get flak from the defendant Sullivan's family that nobody is doing anything. I would in turn transfer the flak on to Judge DiBona who would promise that something would be filed, etcetera. Then I would get a copy or have made known to me what was filed. So actually I had no part in the actual filing of the papers or the formulation of them. I thought that these things, quite frankly, were raised. I'm surprised that they weren't.

Q But you know now that they weren't?

A Yes, I know now.

****

****

A I recall communications from the family to the effect that they had been trying to get Judge DiBona to act. And there were complaints about inactivity. And they complained to me in that fashion. I, in turn, would call Judge DiBona and say, "Look, isn't that ready yet?" Or, "When are you going to file it?"

Q I would ask you in reference to after the decision of the Supreme Court had come down.

A Oh, after the Supreme Court decision? No, I don't recall except for Marilyn Gelb communicating with me some time after that.

Q You indicated on direct examination that you couldn't speak to Mr. McGrath because he was guarded closely around the clock. Was the reason for that ever explained to you?

A The normal procedure when Dick Sprague tries a case.

Q You mean you don't recall it being stated at trial that his life had been threatened by members of 107?

A All of the cases that I can recall in history being tried.

Q I asked you about this case.

A Sir, this would include that case. I can never recall a case in which lives of witnesses were not alleged to be threatened by Dick Sprague.

Q Don't you recall Mr. McGrath stating that at the trial itself, in open court?

A I can recall him saying something about having fear because of some of the things that were going on around Local 107, but I don't recall him specifically saying that anyone connected with this case threatened him. I think he had some fears, but I don't recall him testifying to any specific threats.

Q Was Mr. Hessian guarded around the clock?

A I can't recall him being guarded around the clock, but then again he wasn't a cooperative witness, as I recall, for the Commonwealth. So I don't know why he would be guarded.

Q But you testified here that he also was in fear of his life, is that not true?

A Not from the case, but generally in fear of taking sides with any faction in the Union. Not that he had been threatened in any fashion, but in the sense that he did not want to get mixed up with one side or the other.

Q In other words, it was general policy in 107 if you took sides your life was in danger?

A I would say at the time this occurred it was the general policy at Local 107 always to have ten or 12 people with you.

Q Do you recall the name of the person that Mr. Sullivan telephoned?

A I don't recall the name of the person, but I recall that it was a young lady that was somewhere out of town.

Q And her last name wasn't Sullivan?

A I can just recall it was the kind of circumstances where it would almost be. That was one of the considerations.

Q In fact, it may have been?

A It may have been. I don't know what she called herself.

Q Now you heard Judge DiBona testify that Mr. Sullivan did not want to take the stand in the case. Does that match your recollection?

A Yes. The one thing that I'm acutely in recollection of is that he's a Judge and I'm not. And we're talking about a Judge testifying about Judge Barbieri, and they are equal jurisdiction. I still have to practice around here. And I can recall --

Q Do you not want to answer the question? Are you requesting permission not to answer?

A I would prefer not to.

THE COURT: He'd prefer that you withdraw the question.

THE WITNESS: Yes.

MR. LUNKENHEIMER: Well, your Honor, I don't think I will.

THE WITNESS: Okay. Would you give it to me again? I forgot it.

THE COURT: State the question.

BY MR. LUNKENHSIMER:

Q Do you recall whether John Sullivan said he did not want to take the stand?

A - It seems to me —

Q Do you recall one way or the other?

THE COURT: Let him answer it.

THE WITNESS: The way I recall it my recollection seems to be that John Sullivan did want to testify because he kept saying over and over, "I didn't do nothing. I got nothing to hide." Now whether he changed his mind or didn't testify because of what was said to him about the pitfalls of "Look, John" -- words to the effect -- "Look, John, even though you have nothing to hide, Sprague, you're

playing in his ballgame, in his yard, and he can make you look bad on these relationships with other women," and things like that. And that may have been the deciding factor. I don't know. But my recollection seems to be that Sullivan did want to testify in the sense that he felt he had nothing to hide.

Q But you don't really have a specific recollection of the conversations?

A No. All my recollection is that in keeping with what I recalled, he indicated that he did want to testify is the fact, that since he didn't testify it must have been something that either I said or Judge DiBona said to him.

Q Now you indicated on direct examination that you had an investigator employed. And his name escaped me. I didn't get it. Bill somebody. Did he indicate to you that the three gentlemen outside the Union Hall had made statements to the police?

A I don't know if he said that they made statements or not. I just don't recall. I recall there being a few witnesses outside. And I can recall something about that. But I can't recall whether he said that the police were aware of it or not.

Q Did you know that they told the police that they heard the sounds of firecrackers and that one of them said he heard the sound of shots?

MR. MORAN: Objection, your Honor.

THE COURT: No, I'll overrule that.

THE WITNESS: I don't recall. Any of the actual specifics of what any of them actually said, I don't now recall. I'm aware that there were some.

BY MR. LUNKENHEIMER:

Q Do you recall Mr. McGrath testifying at trial that he had spoken to all of the officers mentioned by petitioner's counsel on direct examination, McGill, Duffy and McGowan?

A I don't recall that specifically.

Q Do you recall whether or not it was brought out on direct examination or on cross-examination that Mr. McGrath gave different statements to those officers than he was giving at trial?

A No. My recollection is that that did not occur because I think that I was surprised -- the way I recall it now I was surprised that when I heard or came across that information in Carchidi's trial. Now

if that occurred, maybe it's something that I might have stepped out to the men's room for or something like that. But I don't recall anything like that. And I do recall that I was surprised to learn what those various statements made by McGrath were at the Carchidi trial, because I think there were seven or eight different versions.

Q Do you recall Judge Barbieri mentioning at the Writ of Coram Nobis that the inconsistencies in Mr. McGrath's prior statements had been brought out before the jury at trial?

A I don't recall Judge Barbieri saying that. I recall a lot of things Judge Barbieri said, and they are all in tune with what Judge DiBona remembers. But I'm glad he said it, he's a Judge.

Q What was the nature of Judge DiBona's participation in the defense of Gregory Carchidi and Tony DiPasquale?

A Well, he assisted me in the same fashion that I assisted him in the Sullivan trial.

Q He did not participate in the questioning of the witnesses?

A No, I don't recall him doing so.

Q And he had been retained by Mr. Sullivan's family privately; is that correct?

A I don't know what arrangements there were with regard to fee. I don't even recall that now.

Q Well, I'm not asking you about how much was paid. Do you recall whether it was a court-appointment for the two of you or whether you were privately retained?

A Recalling the size of the fee, I can't even say we were retained. But it was private.

Q I'm sure you don't still work as cheaply.

A If I may make a commercial, I still am very reasonable.

Q But only to the wealthiest of clients.

A Well, they are before they get me.

MR. LUNKENHEIMER: I'm glad we have that on the record somewhere, your Honor.

THE COURT: I don't think we have to have all this discussion about counsel fees on the record. Do you, Miss Gelb or Mr. Moran?

MR. MORAN: No.

MS. GELB: No, except that I'm glad that he brought out the fact that Mr. Peruto was not court-appointed because the Supreme Court seems to think that he was

when we filed our opinion.

MR. LUNKENHEIMER: Your Honor, I move to strike that unless it can be made part of the record.

MS. GELB: Your Honor, the Supreme Court in Commonwealth v. Sullivan sc states.

THE COURT: He's testified and it's in the record. You've testified that you were not court-appointed but privately retained.

THE WITNESS: That's right.

MR. LUNKENHEIMER: I have no further questions.

THE COURT: Any redirect?

MR. MORAN: Yes, sir.

MR. LUNKENHEIMER: Your Honor, it may become necessary for me to recall Mr. Peruto in terms of the issue of the entry of appearance in the Supreme Court. I don't have the document in terms of whether or not he signed it or someone else signed it present in court today.

THE COURT: Well, can't you work that out?

THE WITNESS: If we have it and I could look at it, your Honor, maybe I could be of some help. I could recognize my signature if there is a signature on any of those pieces of paper.

THE COURT: He may have to go to Montgomery County or Delaware County or somewhere, you know.

MR. LUNKENHEIMER: Media, your Honor.

THE COURT: You want to get him to testify while he's here.

THE WITNESS: As I recall, all of the papers that Judge DiBona filed, he signed the petitions and the various post trial motions, etcetera, etcetera, and put my name underneath his typewritten name. But I don't recall ever personally signing any of them.

MR. LUNKENHEIMER: Well, your Honor, again I request the opportunity, if it becomes necessary and if the stipulation could not be agreed to, to recall Mr. Peruto.

THE COURT: Well, you're

anticipating something that may not occur. Now if that occurs, then you can move for it. But at this point we're not anticipating it.

MR.MORAN: May I continue, sir?

MR. LUNKENHEIMER: Yes, please.

REDIRECT EXAMINATION

BY MR. MORAN:

Q Counsel for the Commonwealth asked you certain questions with respect to things Judge Barbieri said to you. Do you recall at various times during the course of the trial when there was a question to the admissibility of certain evidence Judge Barbieri saying that he was going to let the evidence in and give the D.A. plenty of leeway because they could not get an acquittal anyway --

THE COURT: Get a conviction.

MR. MORAN: Excuse me. Get a conviction.

MR. LUNKENHEIMER: I make the same objection as to hearsay.

THE COURT: I'll overrule it. Do you understand the question?

THE WITNESS: Only too well. I understand that Judge DiBona is a Judge.

But I must say that I do agree in the same fashion as Judge DiBona testified.

BY MR. MORAN:

Q And one further question on that line. Could you explain to me, sir, if that is true, that Judge Barbieri made a decision with respect to the admissibility of evidence on that ground, why that wasn't raised in the lower court in your motion for a new trial and arrest of judgment?

A The only thing that I can do is offer by way of explanation that out of deference to the fact that these were off the record remarks and that perhaps Judge DiBona felt that he could not raise them in that regard. I don't know.

Q During the course of your discussion with Mr. Sullivan and Judge DiBona with respect to whether or not there would be any evidence presented, did you communicate to Mr. Sullivan Judge Barvieri's feelings with respect to the D.A. unable to get a conviction? In other words, did you tell John Sullivan that Judge Barbieri said time and time again considering the course of the trial that there was not enough evidence to get a conviction?

A Oh, yes. All of that attitude that Judge DiBona testified to was --

MR. LUNKENHEIMER: I move to strike the answer as not responsive. The question was did you tell him.

THE WITNESS: I probably told him as much as Fred DiBona told him because we both heard it. And my recollection is either he told him and I agreed that that's what occurred or I told him and Fred DiBona agreed that that's what occurred.

MR. MORAN: Thank you, sir. That's all I have.

RECROSS-EXAMINATION

BY MR. LUNKENHEIMER:

Q In other words, you don't know specifically whether you told him or not?

A No. I specifically know that he was told. Exactly whose mouth was moving at the time of the telling I can't be certain, but I'm absolutely certain that each of us said it on more than one occasion.

Q You don't know who said it but you're sure each of you said it?

A Yes, that's right.

Q That's an interesting physical ability.

A Sure, especially in view of the fact that it was said so many times.

MR. LUNKENHEIMER: I have nothing further.

(HEARING CONTINUED TO APRIL 25th, 1974.)

EXCERPTS FROM TESTIMONY OF JOHN SULLIVAN
APRIL 25, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

Lead 187

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN, Defendant	:	NUMBERS 190 and 193

POST CONVICTION HEARING ACT PETITION

- - -

Room 784, City Hall
Philadelphia, Pennsylvania

- - -

April 25, 1974

- - -

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

(MS.) MARILYN J. GELB, ESQUIRE and
JAMES M. MORAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

Q Now did there come a time after that date when you had engaged other counsel?

A Yes, ma'am.

Q Do you have any recollection of when that was?

A It's sometime in December.

Q And who are the attorneys that you engaged?

A Mr. G. Fred DiBona and A. Charles Peruto.

THE COURT: Now when you say December, you mean 1966?

THE WITNESS: Yes, sir.

BY MS. GELB:

Q And that was apparently subsequent to your indictment. And I may state for the record that the Bills of Indictment indicate that the Bills were returned on November 14th, 1966. Taking that as a focal point, Mr. Sullivan, you retained Mr. DiBona and Mr. Peruto subsequent to November 14th, 1966; is that correct?

A That's correct.

Q Will you tell the Court the circumstances of your retaining these attorneys to represent you.

A Yes. Well, as I was arrested with two other fellows, and we discussed the matter, and I had told them that my preference was to hire Mr. Walsh to

handle my case. I said the only problem was that I didn't have the money sufficient enough to pay Mr. Walsh. And it was brought out to me by the other two fellows that they had something to do with Mr. Peruto and that Mr. Peruto and his partner, which they didn't name at the time, would handle the case and handle the whole three of us. And I agreed to go along with this.

Q Did you at any time pay Mr. DiBona or Mr. Peruto to represent you?

A I did not.

Q Did you at any time ask them to represent you personally?

A Well, it was a foregone conclusion after they arrived to visit us at the prison.

Q Did you make the contact to ask them to come visit you?

A I did not, no.

Q To your knowledge did anybody, any member of your family pay any counsel fees to Mr. Peruto or Mr. DiBona?

A Not to my knowledge.

Q By the way, Mr. Sullivan, there is no question that you did not have court-appointed counsel for your case; isn't that correct?

A I wasn't aware of it if I did.

Q Mr. DiBona and Mr. Peruto were the only attorneys you had subsequent to that one retention of Mr. John Patrick Walsh on November 3rd; is that correct?

A That's correct.

Q Now, did you meet with Mr. DiBona and Mr. Peruto prior to your trial of your case?

A Yes, I did.

Q Mr. Sullivan, after your attorneys were retained, was there ever an occasion when you met your attorneys jointly with the other two co-defendants in this case?

A Yes, there were numerous occasions.

Q And were there discussions held among all of you with respect to developing information in an investigation of this case?

A Yes, ma'am.

Q Did you ever in the course of any of those discussions meet with an investigator named William Christine?

A Yes, I did.

Q And did you meet with him at any time when other co-defendants were present as well?

A Sometimes and sometimes not.

Q I take it then that there was more than one time that you met with Mr. Christine?

A Yes. He was present just about every day in City Hall.

Q Prior to the time your cases were tried, did you ever meet with him and counsel?

A Just one time he came up just for me to sign a paper, pauper's oath that he delivered.

Q Did you participate in and contribute information to your attorneys and to Mr. Christine that would tend to establish your innocence?

A Yes, ma'am.

Q As a matter of fact, did you discuss with your attorneys possible testimony of a gentleman named Hessian?

MR. LUNKENHEIMER: Objection, your Honor. I've allowed the questions to be leading up to now for expediency, but in this area I wish they would not be leading questions in accordance with the Rule.

THE COURT: Don't lead.

MS. GELB: Right.

BY MS. GELB:

Q Would you tell the Court what kind of information you gave to your attorneys with respect to establishing your innocence in connection with these

charges.

A In respect to Mr. Hessian?

Q If you want to start there first, Mr. Sullivan, go ahead.

A Mr. Hessian was the head of the Union. At that time the Secretary-Treasurer was the head of the Union. And he was in that title. And after this tragedy occurred, Mr. Hessian came to me and said as the Head of the Union that he was advised --

MR. LUNKENHEIMER: Objection, your Honor. Again we are going into hearsay.

THE COURT: Well, just tell us what you did.

BY MS. GELB:

Q What did you tell your attorneys with respect to Mr. Hessian?

A Oh, I understand. I said that I spoke with Mr. Hessian and Mr. Hessian advised me that Mr. McGrath --

MR. LUNKENHEIMER: Objection.

THE COURT: This is what he told his attorneys. I'll overrule that. Go ahead, tell us what you told your attorneys.

THE WITNESS: That Mr. Hessian

said that Mr. McGrath visited him at his home Sunday morning and told him that he didn't see anything, didn't hear anything, didn't know anything. Mr. Hessian said he would so testify in my behalf.

BY MS. GELB:

Q Did Mr. McGrath in fact testify in the case against you?

A Yes, he did.

Q And the record will speak for itself. But can you tell the Court, did Mr. McGrath say that he didn't see anything or hear anything?

MR. LUNKENHEIMER: Objection.

THE WITNESS: He did not.

MR. LUNKENHEIMER: The record speaks for itself. It speaks for itself, your Honor.

THE COURT: All right, I'll sustain that.

BY MS. GELB:

Q At any rate, you spoke to your lawyers about asking Mr. Hessian to testify in your behalf?

A Yes, ma'am.

Q Was there any other area about which you spoke to your lawyers that related Mr. Hessian's

testimony as tending to establish your innocence?

A Well, Mr. Hessian's testimony showed that Mr. McGrath wasn't telling the truth.

Q Was there any other area, aside from Mr. McGrath's testimony, about which Mr. Hessian had any information that you gave to your lawyers?

A I don't understand that question.

THE COURT: Did you tell your lawyers anything else about Mr. Hessian? I think that would cover it.

THE WITNESS: Not to the best of my recollection.

BY MS. GELB:

Q Was Mr. Hessian President of the Union at that time?

A He was Secretary-Treasurer of the Union.

Q Was Mr. Hessian in a position to know the schedules of those persons --

MR. LUNKENHEIMER: Objection. Again, your Honor, she's leading the witness.

THE COURT: I'll sustain that.

BY MS. GELB:

Q Did you ever have a conversation with Mr. Hessian that related to --

MR. LUNKENHEIMER: Objection.

Same objection.

THE COURT: Well, finish your question.

BY MS. GELB:

Q Mr. Sullivan, did you ever have a conversation with Mr. Hessian with respect to your hours of employment at the Union?

A Yes.

MR. LUNKENHEIMER: Objection.

THE COURT: I'll overrule that.

MR. LUNKENHEIMER: It's leading, your Honor.

THE COURT: Well, there has to be a certain amount of it.

MR. LUNKENHEIMER: Well, your Honor, the purpose of the leading question and allowing her to do it is allowing her to get information --

THE COURT: No, I don't think that this is a prejudicial question.

MR. LUNKENHEIMER: The answer has already been no, there was nothing else said about Hessian. Now without leading questions --

THE COURT: Your next question.

BY MS. GELB:

Q As a matter of fact, what were your hours of employment at the Union?

A I had no specific hours. My hours, if I started at eight o'clock and worked to nine o'clock, if I started at seven o'clock and worked to three o'clock was my own affair.

THE COURT: What was your title or what were your duties?

THE WITNESS: I was what you would call a Health and Welfare Official, sir. I used to collect delinquent accounts.

BY MS. GELB:

Q Were you in fact working at your job on June 17th, 1966?

A Yes, ma'am, I was.

Q Were you working on your job about seven o'clock in the evening on June 17th, 1966?

A Yes, I was.

Q Is there anyone who was in a position to know that you were then working on your job?

A Well, Mr. Hessian and all the business agents. And just about everybody knows that I was in the building quite late on numerous occasions.

Q So that it was not unusual for you to be

in the building?

A No way at all.

Q And would Mr. Hessian be in a position to know that?

MR. LUNKENHEIMER: Objection.

THE COURT: I'll sustain that.

BY MS. GELB:

Q Did you at any time tell your attorneys that Mr. Hessian should be called to testify in your behalf because of the knowledge that he had about your working hours?

A Yes, ma'am.

MR. LUNKENHEIMER: I object to the leading form of that question.

THE COURT: I'll overrule that.

THE WITNESS: Yes, ma'am.

BY MS. GELB:

Q What did you tell them?

A I told them that Mr. Hessian can verify the fact that I worked in the building and that he himself was present with me on numerous occasions, amongst other people. We had a habit of staying there late. It was a known habit.

Q And you told that to your lawyers?

A Yes, ma'am, I did.

Q Did there come a time during the course of your trial when you became aware of any other evidence that you gave to your lawyers that might tend to establish your innocence?

A Yes, ma'am.

Q Will you tell the Court just what that was.

A Yes. There was testimony relating to the fact that Mr. Gorey and Mrs. Janda had dinner in a diner at 54th and Spring Garden. I just don't recall just where. And it came to my attention through Bill Christine that they had dinner at the Brewery Tavern. And I believe that's located at Hancock and Girard. I'm not positive.

Q Did you discuss this with your lawyers?

A I did.

Q And did you at any time ask them to adduce that evidence at your trial?

A I did.

Q Did you at any time discuss with your lawyers any testimony that Detective Houston gave at your trial?

A Yes, ma'am, I did.

THE COURT: What was the name?

MS. GELB: Detective Houston.

THE COURT: No, the name of the

lady who had dinner at the Tavern.

MS. GELB: That was one of the decedents, your Honor, Mrs. Janda, J-a-n-d-a.

THE COURT: Mrs. Janda?

MS. GELB: Yes, sir.

THE COURT: And who was the other person?

MS. GELB: The other decedent, Gorey, G-o-r-e-y.

THE COURT: All right.

BY MS. GELB:

Q Did you have occasion to discuss with your attorneys the testimony that Detective Houston gave in the Commonwealth's case?

A Yes, ma'am, I did.

Q And did you suggest to your lawyers any testimony that you ask them to call that may have tended to establish that Detective Houston was not testifying truthfully?

A Yes, ma'am. Immediately I did.

Q Immediately. When was immediately, what point?

A As soon as he made the statement that he made. And I leaned over and told him that it was not true and we could prove it was not true.

Q What did you say to your lawyers?

A I said that I was recommended at that time by a fellow by the name of Gerald Rome, who was the Union lawyer at the time, and that I engaged Mr. Gerald Rome when I was taken down to the Roundhouse for questioning. And Mr. Rome represented me at that particular interrogation, if that's what you want to call it. Now before Mr. Rome got there, I was seated at a desk with Detective Houston, and he asked me my name and I replied. He asked me my address and I replied, and my phone number. And after the phone number he said, "Well, I want to ask you some questions that's strictly routine." And I says, "It's my understanding that you've spoken to other people that belong to the Local." And he says, "Yes, I have." I said, "It's my understanding that they had the Union attorney present." He said, "Some did, some didn't." I said, "If you don't mind, I'd like to call him." He said, "Well, you don't need him. Save the Union money." I said, "If you don't mind, I'd like to call him." So he gave me access to the phone. I called the Union office. The hotel -- excuse me. The operator at the switchboard called Gerald Rome and they had what they call a three-way connection. She got Mr. Rome, and I spoke to Mr. Rome, told him where I was, and told him

that I was with Detective Houston. I said that I gave him my name, address and phone number and I asked to speak to you. He said, "Did you say anything else?" I said,"No, sir." He said, "Would you put him on the phone." And I pointed to Mr. Houston. He picked up an extension and he got on the phone.

Q And this was all in your presence?

A Yes, ma'am. I was on the phone.

Q Just to clarify, before we go on with this any further, can you tell the Court when this took place?

A I don't know the date.

Q Was it before the inquest on November 31st, 1966?

A Yes, definitely.

Q Go ahead.

A And Mr. Houston picked up the phone and Mr. Rome said that he would be down --

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: Overruled. Go ahead.

THE WITNESS: He said that he couldn't make it in any time less than an hour, that he had some business to take care of, that he said he would be definitely

there in an hour and he was not to talk to me or ask me any questions. He said, "Fine, counsel." And that's the way he answered. I said, "Thank you. I'll wait for you," and I hung up the phone and he hung up the phone. And after that, Mr. Houston came to me and he pointed to a door. He said, "We're going to have to lock you up until he gets here." And I said, "Am I under arrest?" He said, "No." And I said, "Well, I'm going to go down and have lunch." And that's what I did, went down and had lunch. And an hour or so later Mr. Rome came and we were questioned in Mr. Rome's presence, or I was questioned.

BY MS. GELB:

Q Did you tell Mr. DiBona and Mr. Peruto exactly what you've just related to the Court now?

A Yes, ma'am.

Q And was your account of what happened exactly the way Detective Houston related it at trial?

A No, ma'am.

Q And when you heard Detective Houston's testimony at your trial, was that the occasion on which you spoke to your attorneys and gave them some

directions?

A I immediately told them.

Q And what did you tell them at that point?

A I told them that Mr. Houston was not telling the truth. And I explained that I had asked for an attorney. And Mr. Houston didn't say that. Mr. Houston said he was interrogating me and I leaped up off the chair and said I demand an attorney. He said words to the effect that John Sullivan said he just wasn't there and he wanted an attorney immediately.

Q And you're saying that you told your lawyers that that wasn't so?

A As soon as -- the words didn't even get out of his mouth.

Q Did you tell your lawyers the name of any person who might be able to so testify?

A I told him that Gerald Rome was there and Gerald Rome could verify the fact that Mr. Houston was not telling the truth.

Q And that took place during the course of your trial; is that correct?

A That is correct.

Q Now, Mr. Sullivan, up until the moment that the Commonwealth rested its case, at the conclusion of its testimony, did you and your attorneys have any

conversation to the effect that you would not testify in your case?

A No, ma'am.

Q What was the understanding that you and your attorneys had on that issue?

A Quite frankly, I thought all along that I was going to testify.

Q Was it your desire to testify?

A Oh, definitely.

Q Did you communicate that to your attorneys?

A Definitely. I was quite confident, and I relayed that message to him quite clear.

Q Now when did you relay that message?

A All during the course of the trial.

Q Can you tell us some of the things that you said?

A No, ma'am.

Q Was there any discussion between you and your attorneys to the effect that no testimony would be put on at the conclusion of the Commonwealth's case on your behalf?

A No, ma'am.

Q Did you at any time talk to your lawyers with respect to putting on testimony in your defense?

A Yes, ma'am, we spoke of it.

Q Did you speak of it before the Commonwealth rested its case?

A Yes, ma'am.

Q And did you talk about what testimony would be put on?

A I spoke of Mr. Hessian and I spoke --

Q Just answer this: Did you speak to your attorneys about what testimony would be put on?

A Yes, ma'am.

Q Now after the Commonwealth rested its case, did you also speak to your attorneys about your testifying and about putting on other testimony in your defense?

A Yes, ma'am.

Q And when did that take place?

A In the Judge's chambers, after the Commonwealth rested its case.

THE COURT: Was the Judge present?

THE WITNESS: No, sir, he was not.

BY MS. GELB:

Q This was a conference that you had with your lawyers; is that right?

A Yes. They asked permission to use the

Judge's chambers at the day's ending of the proceedings that day.

Q Now you've heard the testimony of Judge DiBona earlier in this proceeding that to the effect that that conference lasted for quite a long time. Is that also your recollection?

A Yes, ma'am.

Q Now will you tell the Court just what is your recollection of what took place during that period of time that you talked to your lawyers about testifying and about the conduct of your case.

A Well, when the Commonwealth rested its case they asked permission to use the Judge's chambers.

THE COURT: Was anybody else present but you and your attorneys?

THE WITNESS: I'm going to name them, sir. We went into the Judge's chambers and present was Mr. G. Fred DiBona, Mr. Peruto, Mr. DiBona's son and his intendant son-in-law, I believe. Now I don't know if he turned out to be, but he was at the time. And it was the four of us in the Judge's chambers.

Q And what were you talking about?

A The five of us.

Q What were you talking about?

A What they did when we got in there, Mr. DiBona and Mr. Peruto reviewed the whole entire proceedings from beginning to end. And all we did was listen. And they went back and forth together with all the testimony that was given. Now after this was done they looked at me, spoke to me and said, -- explained. Then they started to explain each point. And we went through all of that. And Mr. Peruto -- well, Mr. Peruto, actually. Mr. Peruto said, "Fred, I got an idea that I don't think we should put on a defense because there's absolutely no evidence in this case at all." And I said, "Wait a minute." I said, "At least I think I should take the stand." I said, "It's not right for me not to take the stand." Mr. DiBona agreed. He said, "I think John should go on the stand." And then we just haggled back and forth. I don't want to keep repeating. We kept going over all the issues of the case and we were talking back and forth and they kept repeating over and over again that there was no evidence involved in the case, that Mr. Barbieri -- they didn't say Judge Barbieri or anything -- Barbieri has indicated to us there's no evidence whatsoever and there's no question of you getting acquitted in this

incident. Like I say, we haggled. This went on for an hour and a half, two hours, maybe two hours and 15 minutes.

Q Well, exactly what did you haggle about?

A Well, most of it was haggling about I wanted to take the stand. Mr. Peruto says, "John, if you take the stand he's going to paint you black and bring up your personal life." I said, "Fine. But that has nothing to do with the case." And I said, "I have nothing to hide." He said, "It doesn't look good." And I argued and argued and argued that even though it was embarrassing I thought that I should. And they insisted that it wouldn't look good and he would "Cut me up" is the words he used.

Q Now what happened at the conclusion of that conference?

THE COURT: Who would cut you up?

THE WITNESS: Mr. Sprague would cut you up.

BY MS. GELB:

Q Now what happened at the conclusion of that conference?

A And we continued to go, like I say, back and forth. Then I said, "Okay." I said, "At least put Micky on the stand to show that Micky didn't tell the truth."

Q Who did you mean by that?

A Michael Hessian.

Q And what exactly did you mean by that?

A Well, I knew at the time that Mr. McGrath went over and spoke to Mr. Hessian, and I knew that he told him another story that what he related on the stand. And I said it would be important for me for Mike to show that Mr. McGrath made it a point to go to his house and tell him. And I thought that was important at the time.

Q Did you make any other suggestions to your attorneys as to any other witnesses who should be put on even if you didn't testify?

A Yes, ma'am. It was my understanding in his opening statement, if I remember it correctly, he said there was people present at the particular time and they would be of some value. And I said, "I think that they should be called to show what their value may be."

Q Now what value were you given to understand they would be? And by people, would you explain what you mean by people present?

A Yes, ma'am. There was to take place that evening, to my understanding, a meeting. And directly

under this window where these people were killed there were people standing there having conversation, waiting to enter the building for the purpose of this meeting. And it was my understanding that at the time this death occurred, or they say it occurred, that these people underneath the window heard nothing whatsoever. And it is my understanding from the testimony that there was something like 12, 13, 14, 15, bullets fired.

Q You heard that testimony?

A I've heard that testimony. I don't know anything about firearms.

Q As a matter of fact, Mr. McGrath testified during the course of the trial that there were people outside.

A He stopped and talked to the people outside.

Q Now was it those people who you spoke to your attorneys about?

A Yes, ma'am.

Q And was it those witnesses that you meant when you asked them to call them to testify that they heard nothing?

A Yes,ma'am.

Q Now how was the decision ultimately made, number one, that you would not testify, and, number two, that no other witnesses would be called in your behalf?

A It went back to the same premises, the fact that there was no evidence and Mr. Barbieri, as they keep saying, Barbieri keeps saying there is no way you're going to get an acquittal and there is no sense risking anything that's going to hurt the other two guys, and we can get away with winning this case here.

Q Now you said a moment ago that Barbieri said to your lawyers there is no way you're going to get an acquittal.

A I didn't say that.

Q What did you say?

A I said there was no way that I was going to be acquitted.

THE COURT: That he was not going to be acquitted?

BY MS. GELB:

Q Is that what you meant, that you were going to be convicted?

A Can we start all over again?

Q Explain what your understanding was.

A That I wasn't going to be convicted.

Q When you just said a moment ago that your attorney said that they didn't want to put witnesses on because somehow it might hurt the other two guys, what was your understanding of that?

A I didn't really comprehend it. Quite frankly, I was in a gaze, you know, I was very aggravated, very mad.

Q Did you know what your attorneys meant when they said the other two guys?

A The two co-defendants.

Q And they told you that at the time that this discussion was taking place?

A Yes. They said there is no sense in putting anything on that may hurt the other two because we've got this case won.

THE COURT: Who said that?

THE WITNESS: Mr. Peruto and Mr. DiBona, sir.

THE COURT: Both of them?

THE WITNESS: Not specifically. I would say Mr. Peruto said it, sir.

BY MS. GELB:

Q Now, Mr. Sullivan, after the trial did you discuss the motions for a new trial and any other post-trial motions that may be filed in your case with your attorneys?

A No, I did not.

Q Do you know in fact whether your attorneys obtained the notes of testimony and reviewed them before

the preparation of the motions?

A I don't know that for a fact.

Q Did you ever see a copy of any brief that was filed in support of the motions for a new trial?

A In Common Pleas Court?

Q Yes.

A Yes, I did.

Q Now after the trial, did there come a time when you became aware of the existence of certain witnesses who might have been used at your trial?

A Yes. Sometimes afterwards.

Q Do you recall the names of those persons?

A One was the name of Tony Salvatore or Anthony Salvatore.

Q Was there anyone else who you became aware of after the trial, to your recollection?

A Detective McGrath. McGill, I believe his name is. This was much, much later.

Q Now will you tell the Court who made you aware of the existence of Mr. Salvatore as a witness in your behalf?

A Well, I understood that Mr. Moran, through his investigator, found this information out, that Mr. Salvatore had called the Local Union Hall that evening at 7:40, 7:45, or somewhere thereabouts, and he spoke

to Mrs. -- and Mrs. Janda answered the phone and identified herself, and Mr. Salvatore asked for someone, a business agent at the Local, and she had related that he just wasn't present and that was the end of the conversation.

Q Now did Mr. Peruto or Mr. DiBona ever tell you that they had that information?

A No, ma'am. It was a shock to me.

Q Now what is the significance of the time 7:40 P.M., Mr. Sullivan?

MR. LUNKENHEIMER: Objection, your Honor.

MS. GELB: I think that's important.

MR. LUNKENHEIMER: It's calling for a conclusion of the witness based on the testimony. It's a legal conclusion that she's asking.

THE COURT: It's just the way the question is asked. I'll sustain the objection.

BY MS. GELB:

Q Mr. Sullivan, you indicated that you became aware of some information that Mrs. Janda had answered the telephone in response to a call from Mr. Salvatore

at 7:40 in the evening.

A Yes, ma'am.

Q Now did the time of Mrs. Janda's death figure in the case against you?

A Yes, ma'am.

Q And after you heard the evidence against you, did you become aware of the significance of 7:40 P.M. with respect to that evidence?

A Yes, ma'am, very much.

Q Now what was the evidence relating to the death of Mrs. Janda?

MR. LUNKENHEIMER: Objection, your Honor.

THE COURT: This, I assume, is in the record, is it not?

MS. GELB: Yes, your Honor.

THE COURT: Well, if it's in the record --

MR. LUNKENHEIMER: His opinion is irrelevant. It's for the Court to review.

THE COURT: You may ask him why he wanted Mr. Salvatore to testify. You can ask that.

BY MS. GELB:

Q Mr. Sullivan, did you decide that you would

like to have Mr. Salvatore testify in your behalf if you had an opportunity to put him on the witness stand?

A Yes, ma'am.

Q And why?

A Because the Medical Examiner's written report, signed written report, I might add, stated that the death was between nine and three in the morning.

Q 9:00 P.M. and 3:00 A.M.?

A 9:00 P.M. in the evening to 3:00 A.M. in the morning. And at trial Mr. Sprague said the death was seven to 7:30. And it was intense examination on that point. And it was brought out that the Medical Examiner's papers were shown that after months of investigation and autopsies and everything that they conduct, the time of death was between nine and three. And Mr. Sprague insisted that it was between seven and 7:30.

Q Now you mention a Detective McGill and you said that you had discovered after your trial that Detective McGill had some evidence that might be helpful to your case. Will you tell the Court about that.

A Yes. I discovered that at the Carchidi trial.

THE COURT: This was after your trial?

THE WITNESS: Yes, sir.

BY MS. GELB:

Q Will you tell the Court what it was that you discovered.

A Yes. Going back at my trial, McGrath had made, his testimony. And Mr. DiBona and Mr. Peruto asked the Court to please relate to them who the detective was that interrogated Mr. McGrath so we could impeach his credibility. The District Attorney refused to give us the name of the detective. Mr. DiBona said that we can't subpoena the whole Police Department. He refused. The Judge upheld him. We never got the name of the detective.

Q Now subsequent to your trial, what happened with respect to this?

A Now the same incident happened at the Carchidi trial.

MR. LUNKENHEIMER: I object to any testimony about the Carchidi trial. I suspect Mr. Sullivan was in jail and not available for the Carchidi trial.

THE WITNESS: No, I was there.

THE COURT: You were present?

THE WITNESS: Yes.

THE COURT: I'll overrule the

objection.

BY MS. GELB:

Q And will you go on and relate to the Court what there was about Detective McGill that was important to you in your case that you heard at the Carchidi trial.

A Yes, ma'am. As I said, they refused to give the name of the detective to Carchidi's attorneys, which were my attorneys. And they argued this point. And Judge Greenberg said that the Commonwealth would have to give up the name of the detective. They did this. Mr. McGill was then put on the stand, and under cross-examination admitted that McGrath had never told him the same statement that he related at my trial.

BY MS. GELB:

Q Now let's get on with what happened subsequent to this trial, the Carchidi trial. Did you have an understanding with your attorneys with respect to the filing of appeals to the Supreme Court of Pennsylvania?

A Yes, ma'am.

Q What was your understanding?

A Well, at the day of sentencing, Mr. DiBona had asked for what they called a Coram Nobis hearing. He said the reason for this was that he wanted to have this hearing to show after discovered evidence and to

make the record clear, in the event that we were to be denied, to go up to the State Supreme Court. And he wanted this on the record.

Q Was it your understanding with Judge DiBona that he would file appeals to the Supreme Court of Pennsylvania on your behalf?

A Definitely. Yes, ma'am.

Q Was it your understanding that he did in fact file such appeals to the Supreme Court?

A I was under the impression that he did, yes, ma'am.

Q And did there come a time when you were advised by Mr. DiBona that he had become a Judge and could no longer represent you?

A Yes.

Q Do you recall when that was?

A I had first read it in the newspaper, to be quite frank about it, and I immediately wrote a letter to his office congratulating him and asked him to send me all important materials such as trial notes and such.

Q Did you hear from Judge DiBona with respect to that?

A No, I did not.

Q Did you write to anyone else in connection

with your appeals?

A I wrote to Mr. Peruto numerous times. I can't tell you how many times.

Q And what did you ask Mr. Peruto to do?

A I asked Mr. Peruto what was going on with the case. I asked Mr. Peruto to please send me notes of testimony. I asked Mr. Peruto to please send me the notes of the Coram Nobis and all notes pertaining to my case.

Q Did you ask Mr. Peruto to do anything in connection with your appeal in your case?

A I asked Mr. Peruto to please get on the ball and get me into the courtroom. Yes, ma'am.

Q What did you mean by get into the courtroom?

A Make sure the briefs were in and make sure he argued my case.

Q Did you at any time have any understanding with Mr. Peruto that he had no obligation to file briefs in your behalf?

A No, ma'am. As co-counsel that was my understanding.

Q Did you at any time have any understanding with Mr. Peruto that he was relieved of any obligation to argue your case before the Supreme Court of Pennsylvania?

A No, ma'am.

Q To your knowledge was a brief ever filed in your behalf?

A No, ma'am, it was not.

Q Did Mr. Peruto ever tell you that he was going to file a brief in your behalf?

A He did.

Q To your knowledge, were your cases ever argued before the Supreme Court of Pennsylvania?

A No, ma'am, they were not.

Q Is it your understanding that no argument was had on your appeals?

A That's correct.

Q Did you ever consent to giving up your right to argue cases and file a brief to the Supreme Court of Pennsylvania?

A No, ma'am. No way.

Q Now did there come a time when you became aware of the fact that your cases were not argued before the Supreme Court?

A Yeah, like seven years later. After the decision was handed down is actually when I found out that no briefs were filed. I had no knowledge whatsoever until that time that there wasn't.

Q Did you write to either of your attorneys to

ask for copies of the brief?

A On numerous times.

Q Did you ever receive a copy of any brief?

A I did not.

Q Did you ever discuss with Mr. Peruto exactly what issues you wanted him to raise on the appeal to the Supreme Court?

A Yes, ma'am, we discussed it.

Q And can you tell the Court at this time what some of those issues were?

A Yes. At the time my idea, being limited as I was, was the conspiracy issue; the fact that we didn't have Detective McGill to testify, Mr. Mike Hessian, the people under the window, the whole bit, myself; the Judge's charge. More than anything else I was, quite frankly, quite bitter.

Q You indicated to your attorneys that you were not satisfied with the charge of the Court; is that right?

A It was outrageous.

Q Did you ask your attorneys to sign certain errors that you believed occurred in the charge of the Court?

A I certainly did.

Q Did you ever discuss with Mr. Peruto or write to Mr. Peruto anything with respect to closing remarks of the Assistant District Attorney who tried your case?

A Yes, ma'am.

Q Did you ever ask him to raise that issue before the Supreme Court of Pennsylvania?

A Yes, ma'am. I told him that I thought the District Attorney was way out of line. And he was speaking of something -- things -- no evidence whatsoever in the case.

Q What were some of those things, Mr. Sullivan?

A Things of the nature -- like in one particular stage in the summation he said that Mr. Sullivan called on the telephone to Carchidi who was laying in wait somewhere. And I don't know how he has that knowledge to say who I called and when I did.

Q Did anything like that take place during the course of the trial?

A As evidence, no, ma'am.

Q Did you ever discuss with Mr. Peruto the assigning of error on appeal your right to challenge the array of the Grand Jury?

A Yes, that was discussed after I became aware

of this fact. And in fact, that was done before trial and we were denied. And the District Attorney made it a point to say that I raised it six years later, which is not so.

Q Now, Mr. Sullivan, did you yourself ever file any proceedings that in any way related to any delays of your appeals?

A Yes, ma'am, with the help -- what's the term, jailhouse lawyer -- I filed a habeas corpus against Mr. Peruto and Mr. DiBona in the Federal District Court.

Q Do you recall when that was?

A No, ma'am. Sixty-something. I don't know.

Q Did you file any other proceeding in the Federal Court?

A I filed that habeas corpus, and it was my understanding it was given to Judge John Morgan Davis. And I received a reply back from Mr. Davis saying it was denied for not exhausting State remedies, that he had no jurisdiction because he was privately retained counsel. He said if nothing is done within 90 days that you may refile. I appealed that decision to the Third Circuit and was denied. I waited the 90 days. Nothing was done. I filed another Petition along with his Order and more information. I can't relate what

that was now. I received a notice back saying that it was denied. I appealed that, I believe, but I'm not positive on that. I believe I appealed that also to the Third Circuit, and I was denied, but I'm not sure if it was taken any further than that.

Q Mr. Sullivan, did you have the benefit of counsel to prepare and argue any of the proceedings that you've just relayed to us were prepared?

A No, ma'am.

Q This was all done then by yourself, without counsel?

A Me and -- excuse the term -- jailhouse lawyer.

Q A jailhouse lawyer, but not a member of the Bar of the Court; is that right?

A No, ma'am.

Q Did you yourself ever file any document with the Supreme Court of Pennsylvania in connection with your appeal?

A Yes, ma'am. What I did, like I said, I kept writing for briefs and I never got any replies.

THE COURT: Kept writing whom?

THE WITNESS: I kept writing Mr. DiBona and Mr. Peruto. And after Mr. DiBona became a Judge, I stopped correspondence.

And I kept writing to Mr. Peruto asking for briefs and information pertaining to this matter. I never received any replies. I took it upon myself and wrote the District Attorney personally and asked him would he please send me the brief. Did he file it in the State Supreme Court. I didn't hear anything on that. I wrote again. I can't remember the specific dates. I didn't hear any reply. I waited so long and I wrote another letter to the District Attorney's office. On that second occasion I then received a letter back and the brief, the District Attorney's brief, stating that it was just filed. And it had the date there, June 18th, I believe it was.

BY MS. GELB:

Q You're now making reference to the brief of the Commonwealth?

A That's correct. And that is how I received it. Upon receiving that brief, naturally, I read it and went over it and I seen it was filled with inconsistencies and things that never even occurred. Fortunately, I had a visit. My wife came up and I explained this to her. I said, "As soon as you get home

you call Chuck. You tell him --"

THE COURT: Chuck, meaning who?

THE WITNESS: Mr. Peruto. I'm sorry. I said, "Immediately get him to get ahold of this brief and to file a rebuttal." She did this. I received word back the next day. Fortunately, I get my wife's mail the next day. I received word back that she spoke to Chuck on the phone and Chuck said that the brief was just delivered to his desk, he hasn't gone over it, and won't be able to do so for a week.

Q What brief was that?

A This is the Commonwealth's brief.

BY MS. GELB:

Q Now did you do anything subsequent to that?

A Yes. I learned through the jailhouse lawyers I only had five days in which to put a rebuttal in. I immediately set out and found me a person and we sat down and relayed the untruths in the brief, wrote my own brief up, had it notarized and sent it to the Supreme Court and sent Mr. Peruto a copy.

Q Now when you say you found yourself a person, are you, once again, referring to a jailhouse

lawyer?

A Yes.

Q You're not referring to a member of the Bar?

A No, ma'am.

Q So that you submitted what you call a rebuttal?

A Yes, ma'am.

Q And you submitted that to whom?

A To the State Supreme Court.

Q Why did you do that?

A Because it was obvious that Mr. Peruto wasn't going to do it.

Q Now what was there in the brief of the Commonwealth that made you very anxious to submit a rebuttal?

A Well, I can name some specifics.

MR. LUNKENHEIMER: Objection, your Honor. I don't think the motivation is relevant --

THE COURT: I'll overrule it. He says he can't remember.

BY MS. GELB:

Q Is that your answer? Did you say you can't remember?

A No. I beg your pardon. I said I can name some specifics.

THE COURT: Go ahead.

THE WITNESS: There was one issue in there that said -- on the inquest issue it said something -- I can't quote it verbatim. It said something about there was no objections made at the inquest. And I pointed out that Mr. John Patrick Walsh did so in fact make a 30, 40 minute speech to the Medical Examiner why this wasn't -- why I shouldn't have been held. I pointed out at one point in their brief where they said Anthony DiPasquale was standing on the pavement as a look-out. This was stated in the State Supreme Court's decision verbatim out of the District Attorney's brief. It says, "Anthony DiPasquale was on the pavement as a look-out." I pointed this out that there was no such testimony at any time in three trials. There was no testimony of Anthony DiPasquale even being alive. And we pointed all this out. And there was some other issues that I can't remember.

BY MS. GELB:

Q Those were some of the issues you had in your rebuttal?

A Yes.

Q Do you know when the decision came down from the Supreme Court of Pennsylvania on your case?

A I think it was December of 1971, late December.

Q Now subsequent to that, Mr. Sullivan, was the petition for reargument filed timely?

A After the decision?

Q After the decision came down.

A Yes, ma'am, there was.

Q And did Mr. Peruto have anything to do with that petition for reargument?

A No, ma'am.

Q Who filed the petition for reargument?

A Marilyn J. Gelb, Esquire.

Q To your knowledge was there also a subsequent petition for leave to file another petition to reargue to file in the Supreme Court of Pennsylvania?

A Yes, ma'am, there was.

Q And did Mr. Peruto have anything to do with the filing of that petition?

A No, ma'am, he did not.

Q And who filed that petition?

A Marilyn J. Gelb and Mr. James M. Moran.

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Q You indicated on direct examination you never retained any lawyer. Why, then, were you represented by Mr. DiBona?

A I thought I explained that, sir. We had the conversation that I had no money, my family had no money, and I related to Mr. Carchidi and Mr. DiPasquale that it was my preference to have Mr. Walsh represent me, and I didn't have a sufficient fund to pay him. They both told me that they had already spoken to Mr.

Peruto and said that Mr. Peruto and his partner -- that was the term that was used -- would handle the case and handle the whole three of us and I wasn't to worry about it. So it was taken care of.

Q So you did not select Mr. DiBona to be your lawyer?

A I did not.

Q In other words, when Mr. DiBona and Mr. Peruto testified that you chose Judge DiBona --

A I thought you were speaking of the time they were engaged. The only understanding I had was that these gentlemen was going to represent the three of us. Who was going to represent me, I have no knowledge, as I stated. It just so happened that I never said anything about Mr. DiBona being older and more experienced. It just happened to be that this is the way it turned out. It was no choosing of drawing straws in a hat.

Q So at trial when Mr. DiBona did all the examination you didn't realize which one of the two lawyers was going to do the examining?

A You mean until the day we went to trial? No, sir, I had no idea. They were both present and they both participated in the trial. They both asked questions in the trial. Mr. Peruto examined prospective

jurors in the trial; Mr. Peruto delivered the penalty phase of the trial; Mr. Peruto sitting next to me was a participant in the trial, back and forth, writing notes and things of that nature, speaking to Mr. DiBona, speaking to me.

Q So you considered their role as equals?

A Oh, yes, sir. Yes, sir. I had no other thought.

Q Now you indicated that you did not pay any fees for this legal representation.

A No, sir, I did not.

Q And your family did not.

A To the best of my knowledge.

Q Did the Union pay the fees?

A Not to my knowledge.

Q You have no idea how these men were paid at all?

A No, sir. Only speculation. There was something about chances were sold and friends' donations and things of that nature. And I understood they worked for nothing, practically. In fact, they made that statement at trial, that they was working for, to use an Italian phrase, "meatballs."

Q You stated that your job at the Union was Health and Welfare official?

A Yes, sir.

Q You collected delinquent accounts?

A Yes, sir.

Q That's what's known in the parlance as an enforcer?

A No, sir.

Q When you collected these --

A I'd like to explain that, sir. Under the Union contract, the Teamsters Union contract, each employer pays so much per man, life insurance, Health and Welfare and pension. This was all done on paper, sir. There is no monies involved whatsoever. After you become four weeks delinquent, our Health and Welfare office will issue what they call the delinquent sheet. I would get this delinquent sheet with the list of the companies that were delinquent and I, in turn, would take the ones that were in the arrears more than others. I would go there, speak to their manager, and tell them would they kindly send in a check to the office and the report of the men that were working there. I had no dealings whatsoever with any money whatsoever.

Q You just went and told them to pay up or else?

A I didn't go to them to pay up. I told them to obey the contract.

Q Or else?

A That's all. And sometimes they didn't pay, sir.

Q And then what did you do to them?

A Nothing. Just went back again and told them to please pay it.

Q So in other words you never collected anything?

A Personally, no. It was mailed into the office with forms.

Q So when you say you collect delinquent accounts, you didn't collect delinquent accounts?

A Technically I didn't, no, sir.

Q Now you've testified about Michael Hessian a great deal. Was Michael Hessian a friend of Micky McGrath's?

A To the best of my knowledge, he was.

Q Was he good friend?

A To the best of my knowledge, very good.

Q In fact, wasn't he involved in getting Micky McGrath a job at the Union?

A To the best of my knowledge he was. I have no proof of this. This is the understanding I have, yes, sir.

MS. GELB: Is Micky a nickname?

MR. LUNKENHEIMER: You recall Micky is the name the witness used on direct examination in reference to Francis McGrath, Frank McGrath. Since the witness had called him Micky, I thought I'd call him Micky also.

BY MR. LUNKENHEIMER:

Q Did you have any reason to think that Michael Hessian as a friend of McGrath's would try to protect Mr. McGrath?

MS. GELB: Objection.

THE COURT: Overruled.

THE WITNESS: I had no knowledge one way or another. I never gave it a thought.

BY MR. LUNKENHEIMER:

Q Was there a power struggle going on in the Union at the time?

A No, sir, there was not.

Q So when Mr. Peruto said yesterday there was a power struggle going on, he was wrong?

A At that particular stage he was wrong, yes.

Q Were you aware that Mr. McGrath had body-guards?

A Oh, yeah. Not aware personally. Hearsay

I was aware.

Q And were you informed by your lawyers that Michael Hessian was very scared to testify?

A No, sir, I was not.

Q Were there other witnesses that you know of that were scared to testify?

A Not to my knowledge, no, sir.

Q You say you became aware that Mr. Gorey and Mrs. Janda may have had the dinner meal at a place other than the place testified to?

A Yes.

Q How did you learn of that information?

A This was brought about by Mr. Christine, the investigator, and he told me. And I don't know what his job is or how he goes about it, but he had located a waitress that was a waitress at the Brewery Tavern, and he went and spoke with her and had information from her that Mrs. Janda and Mr. Gorey had dinner in there Friday evening.

Q Did he also tell you that several members of the Union had had dinner there that evening?

A No, he did not.

Q Did he tell you that they would not testify that Gorey and Janda were present there?

A No, he did not.

Q How did you learn that the people outside the building were going to testify -- or did not hear any shots?

A This was just common knowledge. This went on, you have to remember, sir, July, August -- some six, seven months later when the inquest was held and the trial was held a year later. And all these people are members of the Local. And I guess you can imagine that there was talk all over the Local.

Q But you weren't at the Local at that time, were you?

A Beg your pardon?

Q You weren't at the Local at that time?

A At that time? At what time, sir?

Q After the inquest and prior to your trial, six months after the crime.

A I was at the Local up until the inquest, sir.

Q Was the inquest six months after the crime?

A Whatever it was, from June after the trial.

Q The inquest, you said, was November, I believe.

A November 3rd, yes, sir, 1966.

Q So that six months after the crime you were in jail, Holmesburg Prison.

A Yes, I was.

Q How did you get common knowledge from the Union while you were at Holmesburg Prison?

A Mr. DiBona made an opening statement to the jury, and in his opening statement he related to the fact that there was -- I believe the term was six, seven, eight people standing directly under the window.

Q So you didn't know of this prior to Mr. DiBona's opening statement?

A No, I did not, no.

Q Now isn't it a fact that at trial Detective Houston testified that you said you didn't do it and you wanted to speak to your lawyer?

A He testified to that, yes, sir.

MS. GELB: If your Honor pleases, I would object. And it was the same basis for objection that Mr. Lunkenheimer was using, the record will speak for itself. And that wasn't what Detective Houston said at all.

MR. LUNKENHEIMER: She was allowed to ask her questions as to what Detective Houston said to him and was allowed to go into it quite at great length, including a three-party conversation --

THE COURT: Well, whatever was in the record at the trial is here before us. And I understand it's all going to be incorporated by reference.

MS. GELB: Absolutely. The basis of my objection is the inaccuracy of the question. I wouldn't object otherwise.

MR. LUNKENHEIMER: If it's inaccurate, the witness just adopted it. He said, yes, that it's true. Now I strongly object to counsel changing the witness's mind or testifying.

THE COURT: Well, I'll overrule the objection. But don't ask questions in the future that are concerning matters of record unless the witness contradicts them.

BY MR. LUNKENHEIMER:

Q Was Mr. Rome available at the time of trial?

A Yes, he was.

Q In fact, Mr. Rome testified, did he not?

A I believe on two occasions.

Q And after Mr. Rome came to the jail, you did not make any further statement to the police on advice of counsel; isn't that correct?

A You mean when he came to 8th and Race?

Q Right.

A The whole thing was that we went into a little room and there was something like maybe roughly six cops, seven cops, I don't know. And we all sat down at a long table, Mr. Rome, myself and the police detectives. And they started to ask questions. Mr. Rome did all the answering. And during this proceedings, after maybe an hour or so, the detectives would look at me, because I was just disgusted with all this rigamarole that was going on, and they said, "Look, you don't need him. You don't have to have counsel. You can get rid of him and save the Union money." And this went on continually.

Q And at no time did you make any statement?

A I did not, to the best of my knowledge. Now that's a long time ago.

Q And no statement of admission of any kind was introduced against you at trial, was it?

A Not to the best of my knowledge. I don't know.

MS. GELB: Once again, would you note my objection, your Honor, because whether a statement was in admission or not is a legal conclusion, and I don't know whether this witness is competent to answer --

THE COURT: Well, just ask him if any statement was offered in evidence.

MR. LUNKENHEIMER: I'll withdraw the question, your Honor.

BY MR. LUNKENHEIMER:

Q Now for you to contradict the testimony of Detective Houston, it would have been necessary for you to take the stand; isn't that correct?

A I imagine it would be, sir.

Q And you in fact did not take the stand?

A As it turned out I didn't, no, sir.

Q Now also when you said on direct examination that Mr. Rome could testify that it was not the truth when Detective Houston said, "I leaped up and demanded an attorney and said I wasn't there," in fact, Mr. Rome wasn't there at the early part --

A I was relating to the fact that Mr. Rome can stand up and state clearly that Detective Houston said I gave him nothing but my name and address, there was no further conversation and that was the end of it. And he could so testify to that fact.

Q But Mr. Rome was not there through the entire period of your conference with Detective Houston?

A No, sir.

Q Now you indicate that you wanted to testify.

A Yes, sir.

Q Did Mr. Peruto want you to testify?

A No, sir.

Q And did Mr. DiBona want you to testify?

A In the beginning he did, yes, sir.

Q And who made the final decision, which of the three of you?

A I had nothing to do with the decision. It was given to me point blank. And Mr. Peruto, after like I say hours of discussion, Mr. Peruto said something to the effect of, "Look, we're the attorneys. You don't know anything about law"-- I'm not quoting him verbatim, I'm using my own language -- and your life is in my hands and we're out to protect it, and you're not to worry, that you'll be acquitted and we're assured that you'll be acquitted. And I said, "Look, you got it, you got the ball, carry it."

Q And you agreed with them that there wasn't much evidence against you?

A I agreed to go along with their decision as an attorney. I have no knowledge of the law.

Q Was it your feeling that there was no evidence against you?

A I still have no way of knowing that.

Q You were present and you didn't hear any of the evidence?

A I heard all of the evidence.

MS. GELB: Your Honor, I object to this whole line because he's arguing with the witness. These are legal conclusions he's talking about, whether this is legal, whether there is sufficient evidence against him.

BY MR. LUNKENHEIMER:

Q In fact, no evidence at trial was produced to place you directly in the room with the two decedents, was there?

A No, sir.

Q And you were aware of this at the time of this discussion?

A I was aware of it, certainly. I was aware of it because I was never in the room, because I was not in the room.

Q Well, in that sense you knew that the Commonwealth hadn't proved that you were in the room, correct?

A I said that I knew that I wasn't in the room, sir.

Q But you had also heard the testimony.

A I heard the testimony, yes, sir.

Q And wasn't it discussed between you and your lawyers that the Commonwealth hadn't proved that you weren't in the room?

A It was discussed between me and my lawyers that there was insufficient evidence to convict, and the Judge agreed.

Q You told us on direct examination that Judge DiBona went over the testimony with you. Didn't he tell you that there was no evidence that you were in the room?

A No. Mr. Peruto stated that he was of the opinion that the evidence was insufficient to get a conviction.

Q That is not responsive to my question.

A Maybe I don't understand your question.

Q On direct examination you said Judge DiBona went through all the testimony with you before anything else was discussed.

A I said that they both went through the testimony, Mr. Peruto.

Q They went through the testimony however?

A They did, sir. Yes, sir.

Q And in going through the testimony, did they

discuss that no evidence was produced to put you in the room?

A Not in them exact terms, no, sir.

Q So when you say they went through the testimony, they didn't discuss all the testimony.

A But they didn't use them words that you're using, sir. They just went through each witness. They didn't mention about anything about room, to the best of my knowledge. Took each witness, went along in sequence, and when they reached the end they said there was no evidence involved in this case and the evidence was wholly insufficient to get a conviction and the Judge agrees. That's the exact words. Nothing about rooms or no rooms.

Q They didn't discuss anything about the fact that nobody could show that you had a gun that day?

A To the best of my knowledge, they did not. This was brought up at trial. And they didn't mention it in reviewing the evidence, no, sir.

Q Or that nobody saw you with either of the two victims?

A They never discussed this in the Judge's chambers, as it were.

Q Or that there were other means of access

into the building?

A They never discussed that, no, sir.

Q Did they ever discuss with you McGrath's testimony?

A Yes. They said it was just unbelievable.

Q Did you agree with them, that his testimony was unbelievable?

A Yes, because I knew he wasn't telling the truth.

Q Did you agree with them that there was no evidence that you had committed this crime?

A I have no knowledge of that. I'm not that well-schooled.

Q I asked you whether you agreed with them.

A I don't know how to answer that and be honest about it.

Q You sat there mute throughout this whole discussion?

MS. GELB: Your Honor, I object at this time. He's arguing with the witness

THE WITNESS: You're not getting through to me.

THE COURT: No, Ms. Gelb, I'll overrule that.

THE WITNESS: You're not getting

through to me. Phrase it different. I just don't understand.

BY MR. LUNKENHEIMER:

Q Did you say anything during this discussion?

A You mean the discussion we had in the Judge's chambers?

Q Right.

A I had a quite a lot to say, yes, sir.

Q If you had no knowledge about any of these matters, what were you talking about?

A I was talking about what I introduce as evidence. I said, "Why don't you bring the people that was standing under the window?"

Q You just said you don't know what evidence is.

A I have common sense, sir. Logic.

Q Could you use your common sense to tell us whether or not you agreed with them that there wasn't any evidence against you.

A I'll try, if that's what you mean.

MS. GELB: Objection, your Honor. Even the Supreme Court couldn't decide that.

THE COURT: Overruled.

THE WITNESS: I agreed that there

was no evidence in that respect.

BY MR. LUNKENHEIMER:

Q So you do know what evidence is?

A No, sir, I don't.

Q So all your discussions on direct examination --

A -- was on logic.

Q That wasn't evidence?

A No. In other words, what you're asking me, sir, is my logical thinking, and my common sense showed me there was no evidence. Now as a matter of law I don't know whether there is evidence or not.

THE COURT: All right, let's get on with something else.

BY MR. LUNKENHEIMER:

Q You stated on direct examination that you know nothing about firearms.

A That's correct.

Q Did you ever make any statements to any other people that in fact you did know what firearms were?

A No, never.

Q You never Shirley Ann Davis that you owned a gun?

A No, sir. I never owned a gun in my life.

MS. GELB: Of course, if your Honor pleases, I would object to this. This isn't even part of the trial at this point on cross-examination.

THE COURT: No, but he can ask this question. This was brought out on direct examination.

THE WITNESS: No, sir.

BY MR. LUNKENHEIMER:

Q And you never owned a gun in your life?

A No, sir, never.

Q Were there guns kept at the Union?

A To the best of my knowledge there wasn't.

Q Was there members of the Union who had guns?

MS. GELB: I object.

THE COURT: I'll sustain that objection.

BY MR. LUNKENHEIMER:

Q Did you have access to any guns?

A No, sir.

Q John Rispo carry a gun?

A I haven't the slightest idea.

Q Do you know who John Rispo is?

MS. GELB: Your Honor, I would

object to this entire line of questioning --

THE COURT: Just a minute. I'll sustain that objection.

BY MR. LUNKENHEIMER:

Q Have you ever seen a gun in your life?

A Have I ever seen a gun in my life? Yeah, in the television and movies and on a police officer.

Q Did you ever in real life except on a police officer?

A To the best of my knowledge, yes. In a store, sporting goods department.

Q Were you ever present at any time when Judge Barbieri stated that there was no sufficient evidence?

A No, I was not.

Q Did you ever discuss with counsel and the other defendants, or was a discussion ever held in your presence what the other defendants defenses would be?

A No, sir.

Q Did you ever discuss with the defendants themselves what their defenses would be?

MS. GELB: Objection.

THE COURT: No, I'll overrule that.

THE WITNESS: No, sir.

BY MR. LUNKENHEIMER:

Q Were you present in Carchidi's trial?

A I said I was in City Hall, sir.

Q Were you in the courtroom?

A No, sir, I was not.

Q So on direct examination when I objected that you weren't present to any testimony in Carchidi's trial and you said, "Oh, yes, I was," you were not telling the truth?

A No, sir, I misunderstood you. I understood you to mean that I was here. I was in conference all along that trial. They would come upstairs and we had discussions. I thought that's what you meant.

Q You said you had conversations during that trial. Were they talking about the case?

A Yes, sir.

Q Were they talking about their defense?

A No, sir. They were speaking at that particular stage of the witnesses that were appearing at that particular trial.

Q So you don't know other than by conversations in the cell room what actually occurred at the Carchidi trial?

A That's correct.

Q You don't know who testified for either side?

A Well, I know what I was told.

Q You know Carchidi testified?

A Yes, I do.

Q And do you know whether anyone else testified for the defense?

A Yes, Nick Vanore, Michael Hessian, Esther Snyder, Detective McGill, Carchidi. And that's the best I can remember.

Q In fact, the Commonwealth called Esther Snyder as a witness, did they not?

A I don't think so.

Q She testified against you at your trial.

A She didn't testify against me, she testified in the trial, sir.

Q As to certain facts in relationship to the switchboard.

A Yes, sir. They were also proven false.

Q And Detective McGill testified for the Commonwealth in your trial?

A No, he did not.

Q He did not testify at all?

A Didn't even know who he was.

Q Now you've indicated that after the trial you learned of Tony Salvatore's existence.

A Yes.

Q Did you know him prior?

A I knew him as a member of the Union, yes, sir.

Q But you didn't know he was a witness to anything; is that correct?

A At the time of trial?

Q Yes.

A No, sir, I did not. No.

Q And did you ever discuss specifically with Judge DiBona who was testifying?

A No, sir, I did not.

Q He was testifying.

A No, sir. I had now knowledge of it.

Q Now if I put this in time, did you ever discuss this with Judge DiBona about his testifying after the trial itself?

A No, sir.

Q So as far as you know Judge DiBona doesn't know what Tony Salvatore could have offered at the trial, that it's something you learned separately --

A I learned that much later, yes, sir.

Q Now you've indicated at several times that you're not conversant with the law, you're not in fact a lawyer; is that correct?

A That's understandable, yes, sir.

Q Did you know what counsel meant on direct examination about oral argument?

A Yes, sir.

Q And how did you know that?

A Well, I know oral means to speak out, sir.

Q And do you know what proceedings are in a case in appeal to the Supreme Court of Pennsylvania in the Commonwealth?

A Very, very vaguely.

Q So you don't know how the Supreme Court handles its cases?

A I haven't the slightest idea.

Q And you did not discuss specifically how the case would be presented on appeal, merely that you wanted it appealed?

A No, sir. I did discuss it, and I'll explain why. I said there's a lot of things that read on paper that have to be explained. I said you should go there before the Court and explain to the Court so they don't have to take it on paper and have to guess at it.

Q So you do know that you can go before the Court?

A My common sense tells me, sir, that an oral argument means to speak out. And I know that as half

an intelligent a human being.

Q So you know that there is oral argument before the Supreme Court?

A I do know, yes, sir.

Q Were you also told also on oral argument that the Commonwealth would be able to describe the brutal nature of this crime to the Court?

A No, sir, I was not.

Q No one ever suggested to you that perhaps it was better on paper to have the nature of this death presented than to have the Commonwealth --

A No way.

Q Let me finish my question.

A Yes, sir.

Q -- describe to the Court the horror of this particular crime?

A No, sir.

Q Did anyone, in terms of your testifying at trial, specifically discuss the embarrassment you personally might have if you were put on the stand?

A I don't understand you, sir.

Q In your discussions about whether you would testify at trial.

A You're going back to the trial now, am I correct?

Q Yes. Did anyone discuss whether or not you wanted to be personally embarrassed on the stand by things in your private life?

A If I understand you right, I'll try to answer it. I don't know if you're correct in your question. I said that Mr. Peruto said that if I were to take the stand that Mr. Sprague would drag my private life out, and he said that that would be very embarrassing not only to me but to my wife.

Q And there were such things in your private life --

MS. GELB: Objection.

THE COURT: I'll overrule that.

THE WITNESS: Quite frankly, I don't think I done any more than you probably done.

MS. GELB: I withdraw the objection.

MR. LUNKENHEIMER: Well, I'll let the record note that that's not correct.

THE WITNESS: That's your opinion.

MR. LUNKENHEIMER: No, that's my knowledge.

BY MR. LUNKENHEIMER:

Q So there were things in your private life

that some people might consider embarrassing?

A I didn't consider it embarrassing because I said I didn't care and I had nothing to hide.

Q Did you speak to your wife about whether she cared?

MS. GELB: Objection.

THE WITNESS: I did not.

THE COURT: Overruled.

BY MR. LUNKENHEIMER:

Q Did you speak to Shirley Ann Davis about that?

MS. GELB: Objection.

THE COURT: That I'll sustain.

MR. LUNKENHEIMER: Your Honor, I believe it goes to a motivation in terms of whether he took the stand or not.

THE COURT: Well, we have no indication at this point about who Shirley Ann Davis is.

BY MR. LUNKENHEIMER:

Q Mr. Sullivan, who is Shirley Ann Davis?

MS. GELB: Objection.

THE COURT: Well, what is the basis for this?

MS. GELB: Your Honor, Shirley

Sullivan - Cross

Ann Davis --

MR. LUNKENHEIMER: Your Honor, we've had much testimony at this hearing about personal embarrassment to the defendant. And I wish to show that there was an individual in Mr. Sullivan's life whose existence might cause personal embarrassment to him and his wife and maybe even to that person as the grounds for the advice given by counsel that such embarrassment may exist.

THE COURT: I'll overrule the objection.

MS. GELB: Of course, he already testified to that, your Honor. And I object to him going beyond that.

THE COURT: Proceed.

BY MR. LUNKENHEIMER:

Q Do you know a Shirley Ann Davis?

A Yes, sir, I do.

Q And are you the father of two of her children?

MS. GELB: Objection.

THE COURT: Well, I don't know that that is material. Is it, Mr. Lunkenheimer?

MR. LUNKENHEIMER: Your Honor, that, I believe, is the cause of the embarrassment. That is the heart of why it might be embarrassing.

THE COURT: I'll overrule the objection.

MS. GELB: If your Honor pleases, would you hear argument on this issue? I don't think that this Petitioner at this time can be forced to answer that question.

THE COURT: You see, he's testified that he wanted to take the stand. Now such motives that would cause him either to take the stand or not take the stand have to be material. They have to be material to this issue.

MS. GELB: And he's testified as to what his motive was in wanting to take the stand.

THE COURT: You may answer. I'll overrule it.

BY MR. LUNKENHEIMER:

Q Are you the father of Miss Davis's two children?

A To the best of my knowledge I am.

Q And you had fathered these children prior to the time of this trial; is that correct?

A Yes, sir.

Q Were your counsel aware of that fact?

A I believe they were, sir, yes.

Q Did you have occasion to speak with Miss Davis at any time during the trial?

A No, sir, I did not.

Q Did you speak to her after your arrest and prior to trial?

MS. GELB: If your Honor pleases, I would object to this.

MR. MORAN: I would like to object too. If your Honor please, I understand your Honor's purpose in letting this in, to show perhaps the motive why the defendant not testify. But it seems to me that any counsel would advise him that this would not be admissible in a trial of this case. That he had a meretricious relationship with any woman of some kind or another, how could that conceivably be admitted into evidence if he took the witness stand?

MR. LUNKENHEIMER: Your Honor, I don't think it's proper for counsel to

be arguing the law as to the theory what counsel may or may not have done.

THE COURT: You see, it's not a question of whether it's admissible or not, it's a question of his motives for either taking the stand or not taking the stand. And, it's for that purpose that I am allowing the testimony to proceed. So I'll overrule the objection.

THE WITNESS: May I say something, your Honor?

THE COURT: Well, you can explain your last answer, if you wish.

THE WITNESS: My motive for not taking the stand was strictly based that there was no evidence that had nothing to do with Shirley Davis. It had nothing to do with Shirley Davis, because when it was brought to my attention that my personal life would be pointed before the Court, I had no objection to it. I said, "Fine. It has nothing to do with the case." And I was willing to take the stand and drag my personal life in front of the stand because it had nothing to do with what I was on trial

for.

BY MR. LUNKENHEIMER:

Q Did you discuss that at all with your wife?

A I did not.

Q So you don't know whether or not she would have been embarrassed by this?

MS. GELB: If your Honor please, I object to that. This has nothing to do with this.

THE COURT: I'll sustain that.

BY MR. LUNKENHEIMER:

Q Have you ever at any time filed a complaint against either or both of your lawyers in this case, based on the handling of your case, with the Disciplinary Board?

A No, sir, I did not.

Q In spite of the fact that you filed two petitions in the Federal Court in regards to your appeal, you never filed such a complaint?

A Quite frankly, I knew nothing about any disciplinary complaints.

Q You did know how to file a petition in the Federal Court.

A No, I didn't. I went and got someone that did know.

Q And who was that?

MS. GELB: Objection.

THE COURT: No, I'll overrule that.

THE WITNESS: If I remember correctly his name was John Brenner.

BY MR. LUNKENHEIMER:

Q And he was a fellow prisoner?

A Yes, he was.

Q Now have you ever read a copy of the Supreme Court opinion in your case?

A In my case? Yes, sir, I have.

Q Yes?

A Yes.

Q And you're aware that in that opinion, in the first footnote, they mention the fact that you filed a pro se brief in this case?

A It's mentioned in there.

Q Is it also mentioned in that opinion that your counsel filed a brief?

A Yes, sir, it is.

Q Now you said at many times that you're not conversant with the law and you've indicated you have to go to jailhouse lawyers for assistance.

A Yes, sir.

Q Given that fact, how did you know to object to the charge of Judge Barbieri to the jury?

A Because it didn't sound right; because he was using terms that weren't stated. He was using terms that told the jury that I was guilty. Like I say, you don't have to have knowledge of the law to see and listen to what somebody is saying.

Q Did you put that in your pro se brief to the Supreme Court?

A I truthfully don't remember, sir. I'd have to look at it.

Q Did you put anything in your brief in regards to Mr. Sprague's closing argument to the jury?

A I don't recall, sir. I'd have to look at it. Quite frankly, what I done, maybe to save a lot of time, I answered his brief. So I didn't put really anything of my own. In effect, what we were doing, was when I took the District Attorney's brief, the Commonwealth's brief, I went through that and on my memory told the fellow that was filling out the paper for me what occurred, what didn't occur, what was true, what wasn't true. He wrote it in his language, and that's what we sent in. In other words, I didn't put a brief in on any allegations that I had myself. So, therefore, that would be admitted because there was never a brief

filed on that.

Q Did you come to the Union hall that day, the day of the murder, with Gregory Carchidi?

A I came to the Union hall alone.

Q And while you were there, did you see Gregory Carchidi?

A In the course of the day, sir?

Q Well, in the evening, after six o'clock.

A After six o'clock I did. Yes, sir.

Q And you saw Frank McGrath there as well?

A Francis McGrath I did, yes, sir.

Q And Anthony DiPasquale?

A No, sir, I did not.

Q Did you see John Gorey there?

A I seen John Gorey get out of his car. And I would have to explain this to you. This is a parking lot here, and the building is here. And there is just a tiny little street. You park your car here. And I seen Mr. Gorey get out of this car with this young lady, who I didn't even know. Now when they come toward the building to enter there is a doorway. When you come towards the building you would then be out of my view. And when they come towards the building and got out of my view, that is the first and last time that I saw Mr.

Gorey or the young lady.

Q And you were seated in the second floor at that time?

A Yes, sir.

Q And you were in Amoroso's office?

A No, sir, I was in my office. It was used. The term "Amoroso's office --"

Q That's how they described it at trial.

A Well, it's not true. The office belongs to me, Amoroso and quite a few other people.

Q But in the trial notes they kept referring to Amoroso-Venore office. That's what you're talking about?

A That's true. But I want to make sure that it was my office also.

Q And you saw Frank McGrath cleaning up?

A I did, sir. In the room with me, sir.

Q And you saw him empty the waste basket?

A No, I did not.

Q Did you have any discussion with him?

A Yes, we had a conversation.

Q And did he relate to you that John Gorey's life had been threatened?

A No, he did not.

MS. GELB: Objection, your Honor.

And I would object to any further questioning. I have let Mr. Lunkenheimer go along here --

THE COURT: I don't see what this has to do with the witness, Mr. Lunkenheimer.

MR. LUNKENHEIMER: Your Honor, he's made denial of presence on direct examination. I think I have a right to examine today --

MS. GELB: He hasn't denied his presence.

MR. LUNKENHEIMER: Your Honor, he's made a denial of his own presence at certain times, and I should be allowed to examine the circumstances surrounding this particular time.

MS. GELB: If your Honor please, he's not denied his own presence there. The only question seems to be exactly when these persons met their deaths. That's the large issue here.

THE COURT: I'll sustain your objection to the last question.

BY MR. LUNKENHEIMER:

Q When did you leave the building?

A Approximately?

MR. MORAN: Objection, your Honor.

THE COURT: That I'll overrule.

THE WITNESS: 7:18, 7:20, somewhere in that nature.

BY MR. LUNKENHEIMER:

Q And by what means, which exit did you go out of?

MS. GELB: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: I don't know if you're familiar with the building. There is a back stairs that leads down into the parking lot, and that is the exit I used.

BY MR. LUNKENHEIMER:

Q That's the same stairs you came up from the parking lot to the second floor?

A I really don't recall if I came in that way or I came in the front earlier that day. I don't know.

Q That exit is on the west side of the building next to the parking lot?

A Parking lot is here, building is here. Yes, sir.

Q And there is a little alleyway between the buildings; is that correct?

A Just a little street, yes, sir.

Q And you were going out the same direction that you saw Gorey and Janda come toward the building, same general area?

MR. MORAN: Your Honor, I think we're getting into trying the merits of this case now, rather than just the question on this particular hearing today.

THE COURT: All right. I know nothing in the direct examination on this point, so I'll sustain that.

BY MR. LUNKENHEIMER:

Q When you left the building, did you walk away or drive away?

MS. GELB: Objection, sir.

THE COURT: That I'll overrule. He can answer that.

THE WITNESS: I got in my car and I drove away, sir.

BY MR. LUNKENHEIMER:

Q And when you left the parking lot, which way did you go?

MR. MORAN: Objection, sir.

THE COURT: Well, now, how is this material?

MR. LUNKENHEIMER: Your Honor, he's already testified on direct examination that he learned there were witnesses outside the building at about this time. And I feel I should have the right to examine.

MS. GELB: If your Honor please, that wasn't his direct testimony. He testified that he was later at trial advised. And, as a matter of fact, Mr. McGrath testified at trial that there were witnesses outside.

MR. LUNKENHEIMER: May I have a right to find out why he doesn't know when he left the building?

THE COURT: You can ask him that first, before you get to that question.

MR. LUNKENHEIMER: Your Honor, my question goes directly to which way he would go and his access to seeing these people. He's testified learning about eight or ten people outside the Union hall.

THE COURT: I don't recall that he said he saw them.

MR. LUNKENHEIMER: Right. And I have the right to ask him why he did not see them.

MS. GELB: If your Honor pleases, the question is then these persons were there. There is no testimony on direct examination that they were there at any time when Mr. Sullivan could see them.

THE COURT: All right, I'll permit you to ask the question. But you just can't go on a fishing expedition. Just this question I'll permit.

Which way did you go after you left the building?

THE WITNESS: Towards 2nd Street.

BY MR. LUNKENHEIMER:

Q In other words, you took a right hand turn out of the parking lot?

A Right.

Q Did you bring your vehicle to a stop prior to entering Spring Garden Street?

A I would imagine I did. I don't know. I would imagine, because there's a little hump.

Q Did you notice anyone standing on the sidewalk in front of the Union hall?

A I didn't notice anything, sir. In other words, I just pulled my car out, made my right turn and continued on my way, sir.

Q Did anyone else leave the building with you at the same time?

A No, they did not.

Q When you left the building, were there any other vehicles in the parking lot?

MR. MORAN: Objection, your Honor.

MS. GELB: Objection, your Honor.

THE COURT: I'll overrule that.

THE WITNESS: There was quite a few vehicles on the parking lot.

BY MR. LUNKENHEIMER:

Q When you left, did you speak to anyone just prior to leaving?

A Yes, I did, sir.

Q To whom?

A I spoke to Carchidi and Mr. McGrath.

Q And they were still in the building?

A Yes, they were, sir.

Q Was there a black '61 Buick with a dented right side in the parking lot?

MR. MORAN: Objection.

THE WITNESS: I couldn't tell you that, sir.

THE COURT: That I'll sustain.

BY MR. LUNKENHEIMER:

Q Did you see anyone else on the second floor of the building, where you were, other than Carchidi and McGrath?

A No, sir, I did not.

Q And you saw no one outside the building at the time you left?

A To the best of my knowledge I didn't. No, sir.

Q Did you ever have a discussion with Nick Frank, Ed Mills, Teddy Williams or Paul Kramer after the day of the murder?

A About what?

Q About the murder itself. Do you know who these people are?

A I recognize some of the names, yes, sir.

Q And you were nodding, no, to my question of having a discussion?

A I wasn't nodding anything. I got an itch.

THE COURT: Can you answer the question? Did you have discussions with these people?

MR. MORAN: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: We had discussions, as I have stated, your Honor, the fact that such a thing occurred. It was general discussion in the Local Union. Yes, sir, I had discussions with just about everybody, sir.

BY MR. LUNKENHEIMER:

Q So you may have had discussions with these four individuals?

A I may have had, yes, sir.

Q And do you have any recollection of what those discussions were?

MR. MORAN: Objection, sir. We don't know who these four individuals were, how these people relate in any way to the issue being tried here today. There's been no testimony of these other people.

THE COURT: Did these people testify at trial?

MR. LUNKENHEIMER: No, sir, your Honor, they did not. However, there has

been much testimony about individuals standing outside the Union hall and the fact that such individuals could testify in the defendant's behalf. And I intend to show in my own case that they will not testify that way. And I'm asking about these individuals.

THE COURT: Well, you can ask him whether he intends to call any of these four people. That you can ask.

MR. MORAN: We'll ask that right now. The answer is, no.

MR. LUNKENHEIMER: Fine, your Honor. I have no further questions of this witness.

THE COURT: You have no further questions now?

MR. LUNKENHEIMER: That's correct.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. GELB:

Q With respect to Detective McGill and his testimony, Mr. Sullivan, when did you first become aware of the existence of a Detective named McGill who

might have anything to offer in the way of your case?

A At the Carchidi trial.

MR. LUNKENHEIMER: Objection, your Honor. I did not ask any questions about Detective McGill. The matter was covered on direct examination.

MS. GELB: Your Honor, I wrote a note exactly when he asked about Esther Snyder and Detective McGill.

MR. LUNKENHEIMER: I asked who testified at the Carchidi trial. I didn't ask anything else. He just stated who. And I said was he called by the Commonwealth and he said "I don't know."

THE COURT: This isn't a game. I'll overrule the objection.

THE WITNESS: At the Gregory Carchidi trial.

BY MS. GELB:

Q At that time did you have any conversation with either of your lawyers about the possibility of your trial being opened in some way to let in some testimony by Detective McGill?

A I beg your pardon. I don't understand you.

Q I'll try to rephrase it, Mr. Sullivan. Did

you talk to Mr. Peruto about the possibility that Detective McGill may be called to testify in some other proceeding related to your case as a result of his testimony in the Carchidi trial?

A It was my understanding that they were going to use him to testify in what they call the Coram Nobis, after discovered evidence.

Q And Detective McGill's testimony was the after discovered evidence?

A That is correct.

Q Now with respect to the possible testimony of someone named Tony Salvatore, were you present in the courtroom when Mr. Peruto testified that he recalled something about having known Rita Janda was called at 7:40 P.M.?

A Yes, I heard him say that.

Q Did you know at the time of your trial?

A No.

Q When did you first become aware of that?

A Mr. Moran, some time ago.

Q Did either of your lawyers at any time discuss with you the possibility that a description of the crimes that were committed might be so inflammatory before the Supreme Court that it might somehow affect the Supreme Court and your appeals?

A Yes, ma'am. Mr. Peruto told me, as he stated yesterday, he was up to see me, I believe, in December of 1969 or 1970. I'm really not positive on that. He was taken there by my brother and my uncle, because I'd been writing and writing and writing. And somehow or other they got ahold of him and took him up. And he got ahold of me and said, "John, we're going to put the appeals in. They're being printed," or something of that nature. I said, "Chuck, don't forget. I want you to argue this case." He said, "I don't feel as though I should argue the case. This may sound silly to you. I hate to use this term," he said, "but they are all Republicans and I don't think it would do us any good to argue." And I said, "I don't see where that makes any sense." After Mr. Peruto left, I went down and had a visit with my brother and uncle and I related to them what happened. They told me that Mr. Peruto said it would do no good to argue the case because the families would be sitting in the front row and the Supreme Court would rule against me.

Q After you had this conversation with Mr. Peruto, what did you say to him?

A I never seen Mr. Peruto any more until I seen him here yesterday.

Q And what did you say to him that day, if

anything?

A I told him I wanted the case argued before the Court so it could be explained.

Q Did you consent to his suggestion not to argue for any reason?

A No way.

Q Do you recall what words you used to him?

A I'm not going to repeat them words here.

Q Did Mr. Peruto indicate to you that he would do what you directed him to do?

A Mr. Peruto gave me the proverbial kiss of death and said, "Don't worry about it," and walked out.

Q Now just one other thing. When you left the Union Headquarters on June 17th, 1966, what exit did you leave?

A There is only one exit.

Q Is there a parking lot there?

A There is a parking lot with poles, yes, ma'am.

Q And was there testimony at your trial as to how many entrances and exits there were to the building on that parking lot?

A Yes, ma'am.

Q And how many are there?

A I don't know offhand.

Q Is there more than one?

A About six or seven, I guess. I don't know.

MR. LUNKENHEIMER: Your Honor, I object. I don't think the witness is responding to the question.

MS. GELB: This was brought out on cross-examination.

MR. LUNKENHEIMER: Your Honor, he's not responding, because the question was exits to the parking lot rather than exits to the building. And his answer is exits to the building itself in toto.

THE COURT: He wants to know whether you're answering to the parking lot or the buildings.

BY MS. GELB:

Q There is one exit from the parking lot; is that right?

A That's correct.

Q And how many exits and entrances from the building?

A Roughly six or seven.

Q So it's possible for persons to be walking in and walking out of entrances or exits to that building without approaching the exit from the parking

lot, isn't it?

A Definitely.

MR. LUNKENHEIMER: I object.

THE COURT: Overruled.

BY MS. GELB:

Q And that can be done by foot or by car?

A Not by car, no, ma'am.

Q Entering or leaving the parking lot?

A You can park the car on the street and enter the building without taking access to the parking lot exit, yes, ma'am. I thought you meant can you drive the car in the building. You can't do that.

Q I didn't mean that. I meant the persons can leave the building by many entrances or exits.

A Without using the parking lot.

Q To enter the parking lot without using that one entrance from the parking lot; is that right?

A That's right.

MS. GELB: I have no further questions.

THE COURT: Now, Ms. Gelb and Mr. Moran, do you have any further testimony to offer?

MR. MORAN: At this time, no, sir.

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EXCERPTS FROM TESTIMONY OF G. FRED DIBONA, ESQUIRE
MAY 15, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	NOVEMBER TERM, 1966
V.	:	
JOHN SULLIVAN, Defendant	:	NUMBERS 190 and 193

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POST CONVICTION HEARING ACT PETITION

VOLUME II

- - -

Room 784, City Hall
Philadelphia, Pennsylvania

- - -

May 15, 1974

- - -

BEFORE: HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

JAMES M. MORAN, ESQUIRE and
(MS.) MARILYN J. GELB, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

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G. FRED DiBona, Judge, Court of Common Pleas, Philadelphia, Pennsylvania, previously sworn.

DIRECT EXAMINATION

BY MR. LUNKENHEIMER:

Q Judge DiBona, I don't believe at the last occasion, when you had testified, you were qualified as to your prior experience in the criminal law. Could you indicate to the Court when you became a member of the Bar.

A 1941.

Q And between --

MS. GELB: May I ask what the relevancy of this examination is, your Honor?

THE COURT: Well, there is a charge of ineffective assistance of counsel. And I assume this is to show background as to that.

MR. LUNKENHEIMER: Yes, your Honor.

BY MR. LUNKENHEIMER:

Q And between 1941 and 1966, did you try criminal cases?

A Yes, sir, criminal and civil.

Q And prior to the trial of John Sullivan, did you try any first degree murder cases?

A Yes, sir.

Q And had you tried jury trials prior to that time?

A Yes, sir.

Q Could you estimate an amount?

A You mean jury trials?

Q The number of jury trials.

A Several hundred, I'd say. Four, five hundred jury trials over the years.

Q And could you estimate an amount of trials in which the charge was murder?

A Five or six of them, I guess.

Q Now, your Honor, whose ultimate decision was it as to the calling of defense witnesses in the case of John Sullivan?

A Well, the ultimate decision was that of Mr. Sullivan.

Q Now I believe you testified the last time --

THE COURT: This was as to what?

MR. LUNKENHEIMER: Calling of defense witnesses.

BY MR. LUNKENHEIMER:

Q I believe you indicated at the last hearing that Mr. Sullivan stated he did not wish to testify; is that correct?

A That was the ultimate decision, yes, sir. We had a long discussion about it, as I testified.

Q Now after he made that decision, was the decision made as to whether to call other witnesses?

A Yes, sir.

Q And who made that decision?

A Counsel did with Mr. Sullivan.

Q And was the decision not to call any other witnesses in any way predicated on the decision to protect the other two defendants in this case, Anthony DiPasquale and Gregory Carchidi?

A No, sir.

MR. MORAN: With all due respect, your Honor, I think he should limit it to Mr. DiBona. There were two counsel involved in this case, and I don't want Mr. DiBona answering for Mr. Peruto.

THE COURT: No, I don't think that was intended by the question.

MR. MORAN: That's the way it was phrased.

THE COURT: Only as to this witness.

MR. LUNKENHEIMER: I'll rephrase the question.

BY MR. LUNKENHEIMER:

Q Was your decision in this matter in any way predicated on a decision to protect the other two defendants in this case?

A My decision as to what?

Q As to whether to call other witnesses other than Mr. Sullivan.

A No, sir, it was not.

Q Was this decision made by you individually, or was it made jointly?

A Well, the decision of not calling Mr. Sullivan as a witness, is that what you're referring to?

Q No, I mean the other witnesses after Mr. Sullivan.

A The decision was made jointly by counsel and the client.

Q Also, your Honor, were you present at the Carchidi trial?

A Yes, sir.

Q Now other than Michael Hessian, who had been called as a Commonwealth witness, and Gregory Carchidi, who was the defendant, did the defense present any other civilian witnesses, I mean non-police witnesses?

A I don't recall any.

MS. GELB: Objection. It's a relevancy question here.

THE COURT: Well, of course, the record will speak for itself, will it not, whether any other witnesses were called.

MS. GELB: I withdraw the objection.

THE WITNESS: I don't recall any others. No, sir.

BY MR. LUNKENHEIMER:

Q Then no witnesses, civilian witnesses, were presented at the Carchidi trial that would have in any way affected the defense of Mr. Sullivan?

MS. GELB: Objection, your Honor. This is a question of whether Judge DiBona remembers any civilian witnesses were called who might have affected the defense of Mr. Sullivan.

THE COURT: Rephrase your question.

BY MR. LUNKENHEIMER:

Q Do you recall, your Honor, whether any witnesses were called that would have affected the defense of John Sullivan?

A I don't recall any civilian witness with the exception of Mr. Hessian, who was called in the Carchidi trial.

MR. LUNKENHEIMER: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MS. GELB:

Q But there were police witnesses who were called, were there not, Judge DiBona?

A My recollection is that's right.

Q And some of those witnesses included Detective Duffy, Detective McGill; is that correct?

A I think that's correct.

Q And those Detectives' names were unknown to you during the course of the Sullivan trial; isn't that correct, Judge DiBona?

A My recollection is that they became known to us some time towards the end of the Sullivan trial. They were not at the time we started the trial, that's correct.

Q And what did you do when those names became

known to you, sir?

A Well, I don't specifically recall at this time.

Q Do you recall at this time, Judge DiBona, in what connection those names became known to you?

A No. It was brought out on cross-examination somewhere toward the end of the Commonwealth's case. I don't recall the specifics of it. I haven't read this record since the date of the trial, since right after trial when I reviewed it for brief purposes.

Q Do you recall, Judge DiBona, that during the course of the Sullivan trial that you and your co-counsel made a request upon the Commonwealth to produce the names of any police witnesses who may have made notes with respect to the testimony of Mr. McGrath who was the star witness for the Commonwealth?

MR. LUNKENHEIMER: I'd object, your Honor. I believe the record would speak for that.

THE COURT: No, this is a little different. I'll overrule that.

THE WITNESS: I have a recollection of something along those lines, yes.

BY MS. GELB:

Q And do you recall that the names of those

police witnesses were not made known to you in response to your request during the course of the Sullivan trial?

A That's correct.

Q Did you participate in the decision to call Detective McGill and Detective Duffy in the course of the Carchidi trial?

A Yes, I did.

Q And is it your recollection that those two officers testified in a way that would contradict the testimony of Mr. McGrath?

MR. LUNKENHEIMER: Objection, your Honor. One, it's outside the scope; two, it's not relevant. I asked only who was called and not the content of their statements. I don't believe the facts of what he said are a critical issue.

THE COURT: We want all the facts. I'll overrule the objection.

THE WITNESS: In the context of the Carchidi trial they did weaken somewhat the testimony of Mr. McGrath.

BY MS. GELB:

Q Do you have any recollection, Judge DiBona, whether in fact there were any other police witnesses

who were called during the course of the Carchidi trial?

A Not without looking at the record.

Q If I were to suggest to you that Detective McGowen may have been a witness in the course of the Carchidi trial, does that in any way refresh your recollection, sir?

A There were several other detectives. Their names I do not recall, nor does your question refresh my recollection. But if I could have the index sheet of the witnesses I could clarify it for you.

THE COURT: Now you said in the Carchidi trial it did weaken the testimony of one of the detectives?

THE WITNESS: No, the McGrath testimony.

THE COURT: The McGrath testimony?

THE WITNESS: Yes. He'd given some statements prior to the alleged official statement, which contradicted some details, his subsequent statement

BY MS. GELB:

Q And the notes that were made with respect to Mr. McGrath's oral statements were the notes that were made available to you during the course of the Carchidi trial; is that correct?

Yes.

MR. LUNKENHEIMER: Objection, your Honor. One, it's repetitive; two, it's not relevant. The issue of what was presented at the Carchidi trial is not relevant as to what occurred at the John Sullivan trial. And Post Conviction relief can only flow from what occurred at the John Sullivan trial. Now it's already been stated by both Judge DiBona and Mr. Peruto that evidentiary rulings that may have been different at the second trial than the first trial permitted certain other evidence to come in that they had not received before. And that's as far as we go on Post Conviction.

THE COURT: I think he's got a point.

MS. GELB: Your Honor, this goes to the issue of whether or not the Commonwealth had certain evidence which it would not disclose to the defense and which, if disclosed, would be favorable to the testimony of the defense. And that was the basis of the question.

THE COURT: Well, you've already

got the testimony. I'll sustain the objection.

MR. MORAN: I realize it's out of order. May I ask a question, your Honor?

THE COURT: Well, I assume there is no objection. Proceed.

MR. LUNKENHEIMER: I have no objection.

BY MR. MORAN:

Q Judge DiBona, if you had been aware of the testimony of Officers McGovern, Houston, McGill and McGowen in the Sullivan case, would you have put them on in that case if you were aware of their evidence, their testimony?

MR. LUNKENHEIMER: Objection, your Honor. It calls for speculation.

THE COURT: No, I'll overrule that. He can answer that.

THE WITNESS: Mr. Moran, this raises one of my philosophies about the law. Your caught in a situation where if I bring suit against John Smith for a hundred dollars I can then take his deposition, take the deposition of everybody in the City of Philadelphia, issue interrogatorie

on just about everyone I wanted and get the information. In the criminal law, unfortunately we don't have that. Had the information been available to me -- and now my recollection is that their testimony was such that it would have had some relevancy in the Sullivan trial -- had I had that testimony, had it been given to me, had my request for it been honored I would have considered calling them at that trial.

Q Isn't it a fact, sir, in the Carchidi case they contradicted the Commonwealth's chief witness, who was McGrath; is that correct?

MR. LUNKENHEIMER: Objection again, your Honor.

THE COURT: I'll sustain that. That you can argue. Both sides can argue at the conclusion of the case.

MR. MORAN: I have a couple other questions.

BY MR. MORAN:

Q I think you said earlier in answer to a question posed by the District Attorney, that John Sullivan made the decision as to whether or not he would testify. Is that what you said?

A Yes, sir.

Q Now you wanted him to testify; is that correct?

A I did, sir.

Q Was it Mr. Peruto who did not want him to testify?

A Mr. Peruto argued against his testifying. Whether he was doing it as a Devil's Advocate or not I wasn't sure. But we had a long discussion with John Sullivan, at which time I took the position he should testify.

Q Mr. Peruto took a position he shouldn't?

A That's correct.

Q Was it after this hour or hour and a half conversation that the three of you had, that Mr. Sullivan decided, okay, he'd go with Mr. Peruto, he wasn't going to testify?

A I think he said at that time he would not testify. And the next morning, my recollection is, he said he definitely made up his mind that he would not testify.

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EXCERPTS FROM TESTIMONY OF GREGORY CARCHIDI
AUGUST 6, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION - CRIMINAL

COMMONWEALTH : NOVEMBER TERM, 1966

v. :

JOHN SULLIVAN : No. 190 and 193

POST CONVICTION HEARING ACT PETITION

June 13, 1974
August 6 and 8, 1974

Rooms 784 and 636, City Hall, Philadelphia, Pa.

BEFORE HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQ.,
Assistant District Attorney,
for the Commonwealth

MARILYN GELB, ESQ.,
JAMES M. MORAN, ESQ.,
for the Defendant

FILED
SUPREME COURT
OCT 7 1974

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DIRECT EXAMINATION

BY MR. MORAN:

Q. Mr. Carchidi, were you also arrested in the killings of Rita Janda and John Gorey?

A. Yes, sir.

Q. Were you also represented by Mr. Charles Peruto?

A. Yes, sir.

Q. And Mr. Fred DiBona?

A. Yes, sir.

Q. Did you eventually go to trial as a result of that arrest?

A. Yes, sir.

Q. Were you tried before or after Mr. Sullivan?

A. After.

Q. During the course of the Sullivan trial, were you in jail?

A. Yes, sir.

Q. And during the course of the Sullivan trial, were you brought down to City Hall?

A. Yes, sir.

Q. And at that time did you have conversations with Mr. Sullivan and Mr. Peruto and Mr. DiBona?

A. Yes, sir.

Q. And were you aware, sir, that a Commonwealth witness by the name of McGrath made certain statements that you had said something to him the night of the shooting?

A. Yes, sir.

Q. Were you questioned by Mr. DiBona and Mr. Peruto with respect to whether or not in fact you had made those statements to Mr. McGrath?

A. Yes, they questioned me.

Q. What did you say to Mr. Peruto and Mr. DiBona?

A. I never made them statements.

Q. You said then that the Commonwealth witness lied?

A. Yes, sir.

Q. Did you offer to testify on behalf of Mr. Sullivan?

A. Yes, sir.

Q. Did you testify on behalf of Mr. Sullivan?

A. No, sir.

Q. Why did you not testify in behalf of Mr. Sullivan?

A. They didn't think it was necessary.

Q. When you say they didn't think it was necessary, who didn't think?

A. Mr. Peruto and DiBona.

Q. They represented you and they represented Mr. Sullivan?

A. Yes.

Q. And they told you not to testify?

A. They didn't think it was necessary.

MR. MORAN: Cross examine.

CROSS EXAMINATION

BY MR. LUNKENHEIMER:

Q. These statements allegedly made by you to Mr. McGrath, at the time they were made was Mr. Sullivan present?

A. No, sir.

Q. Was he in the building at that time?

A. I believe so.

Q. Had you and he arrived together?

MR. MORAN: Objection, your Honor.

THE COURT: I'll overrule that.

BY MR. LUNKENHEIMER:

Q. Had you and he arrived at the building together?

A. No, sir.

Q. Had you seen him in the building?

A. Yes, sir.

Q. When did you leave --

MR. MORAN: Objection, your Honor.

THE COURT: What do you mean by building?

MR. LUNKENHEIMER: Local 107 union headquarters.

MR. MORAN: If your Honor please, I respectfully object again, sir. This goes beyond the scope. He was offered for a specific reason.

THE COURT: Well, but it concerns, or it may concern the statement, so I'll overrule it.

THE WITNESS: At the same time Mr. McGrath left. I don't know exactly what time it was.

BY MR. LUNKENHEIMER:

Q. And that was after hearing shots fired?

A. I don't know what they were. I heard noises.

Q. Now what did you say to McGrath at that time?

A. I don't recall saying anything outside of, "Let's get the hell out," or, "Let me get the hell out," something like that. I don't recall. All I wanted to do was get out.

Q. Had you talked to Mr. McGrath about what he was doing in the building on that night?

A. Yes. I was sent there purposely to look for him because he hadn't shown up for work for a few nights and Mr. Hession asked me to notify him that they wanted to see him in the front office first chance he got.

Q. And did you tell him that?

A. Yes, sir.

Q. Did you have a discussion with him about whether or not he should be cleaning the building that day?

A. I don't recall, because we usually did it on Fridays or Saturdays or Sundays, whenever they had the time.

Q. Didn't you tell him to come back some other day because it was going to be a big meeting and pointless to clean today?

A. I don't recall.

Q. Did you see Mr. Gorey and Miss Janda enter the building?

A. No, sir.

Q. Did Mr. DiBona or Mr. Peruto give you a more specific reason why they didn't think it was necessary for you to testify?

A. Well, we had conversations during release and Sunday lunch, and from all indications that they

told me and that I got from some of the sheriffs that it was no trial, it was a joke, and that he would be acquitted and nothing else was needed. Some of the sheriffs said this also.

Q. Were you present when Mr. Sullivan told Mr. DiBona he didn't want to testify?

MR. MORAN: Objection, your Honor.

THE WITNESS: No, let me answer that, please.

MR. MORAN: I withdraw it.

THE WITNESS: To the contrary, he fought like hell to testify.

BY MR. LUNKENHEIMER:

Q. That was in your presence?

A. Yes, in my presence.

Q. Were you ever interviewed by the detectives in the Philadelphia Police Department in relationship to this case prior to your case coming to trial?

MR. MORAN: Objection, your Honor.

THE COURT: I'll overrule that.

THE WITNESS: I think a few of them did talk to me in 107, or they tried to have an interview with me. And I told

my attorney at the time and he said any time they wanted me he would take me in and sit down with me.

BY MR. LUNKENHEIMER:

Q. Did you ever tell any representatives of the Philadelphia Police Department or the District Attorney's Office prior to trial what you said in Mr. McGrath's presence on the day of the shooting?

A. Did I ever tell any of the detectives?

Q. Either a detective or a D.A.

A. I've never had the interview. Never wanted to take me in with my attorney, only by myself.

Q. No one ever spoke to you even in the presence of your counsel?

A. No, not that I can recall.

Q. Did you ever ask your counsel to inform the Philadelphia Police Department what you knew of what happened that day?

A. No.

Q. Did you ever relay to anyone other than Mr. Peruto and Mr. DiBona what you knew to have occurred that day from your own personal knowledge?

MR. MORAN: Objection, your Honor.

THE COURT: Overruled.

THE WITNESS: Not that I can recall. I never discussed with anyone.

BY MR. LUNKENHEIMER:

Q. Did you testify in your own defense at the trial?

A. Yes, sir.

Q. Were any other witnesses called in your defense who were outside the building that day?

A. I can't recall. I believe there was. I don't remember his name, but I think he worked in the dues office collecting dues, the monthly dues.

MR. LUNKENHEIMER: No further questions.

REDIRECT EXAMINATION

BY MR. MORAN:

Q. Mr. Carchidi, on the night of the killing did you say to Mr. McGrath, "Get the hell out of here, keep your mouth shut"?

A. No, sir.

Q. And you were willing to testify to that in the Sullivan case?

A. Yes.

****

EXCERPTS FROM TESTIMONY OF A. CHARLES PERUTO, ESQUIRE
AUGUST 8, 1974

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION - CRIMINAL

COMMONWEALTH : NOVEMBER TERM, 1966

v. :

JOHN SULLIVAN : No. 190 and 193

POST CONVICTION HEARING ACT PETITION

June 13, 1974
August 6 and 8, 1974

Rooms 784 and 636, City Hall, Philadelphia, Pa.

BEFORE HONORABLE ETHAN ALLEN DOTY, A.J.

PRESENT:

KARL LUNKENHEIMER, ESQ.,
Assistant District Attorney,
for the Commonwealth

MARILYN GELB, ESQ.,
JAMES M. MORAN, ESQ.,
for the Defendant

FILED
SUPREME COURT
OCT 7 1974

****

A. CHARLES PERUTO, Attorney-at-Law, duly sworn.

DIRECT EXAMINATION

BY MS. GELB:

Q. Mr. Peruto, you testified earlier in this case with respect to the absence of a brief in the Supreme Court of Pennsylvania on the appeal of John Sullivan's case. Now can you tell this Court whether you ever had a conversation with James Crawford of the District Attorney's office with respect to the filing of a brief in this case?

A. I don't recall any conversation with James Crawford.

Q. Can you recall whether at any time on or before November 26th, 1969 you met with Mr. Crawford in the office of the Prothonotary of the Supreme Court and discussed at that time with him the

submission of this case without oral argument?

A. No. I don't see how that could have been. He might be confused with another case if he so says, because I had nothing to do with the appeal.

I worked with Judge DiBona on the case. There were three defendants. The three defendants had the election as to whom they wanted to be represented by. Mr. Sullivan elected to be represented by Fred DiBona and the other two elected to be represented by me. I took it that it was Judge DiBona's responsibility to follow through with briefs, appeals, etcetera, and I would offer whatever assistance I could. But I had nothing to do with the filing of any brief. To this day I don't ever recall ever having seen a brief. I understood that he was taking care of that. And there was no such conversation that I can possibly recall with Mr. Crawford or anyone else.

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EXCERPTS FROM TESTIMONY OF GREGORY CARCHIDI
AT MEDICAL EXAMINER'S INQUEST
NOVEMBER 3, 1966

In re: :
:
Inquest by :
JOSEPH W. SPELMAN, M.D. :
Medical Examiner, :
City of Philadelphia, :
in the deaths of :
JOHN JOSEPH GOREY :
:
and :
:
RITA JOSEPHINE JANDA :

Philadelphia, Pa., November 3, 1966

Room 453, City Hall

Before: JOSEPH W. SPELMAN, M.D.,
Medical Examiner,
City of Philadelphia.

Allen Kaplan
OFFICIAL COURT REPORTER
COURT OF COMMON PLEAS No. 3
357 CITY HALL PHILADELPHIA, PA. 19107
MUnicipal 6-3743

****

GREGORY CARCHIDI (430 West Browning Road, Bellmawr, New Jersey), sworn.

BY MR. SPRAGUE:

Q. Mr. Carchidi, we have a bench warrant for you for your not being here at ten o'clock. Why weren't you here?

A. I respectfully refuse to answer anything that might tend to incriminate me on the grounds of the Constitution of Pennsylvania and of the United States.

Q. Now, Friday, June 17, 1966, were you in Local 107 Union Hall, 105 Spring Garden Street, in the evening?

A. I respectfully refuse to answer the question on the grounds that it might tend to incriminate me, according to the Constitution of Pennsylvania and the United States.

Q. On the particular evening, did you see John Sullivan?

A. I respectfully refuse to answer the question on the grounds that it might tend to incriminate me, according to the Constitution of Pennsylvania and of the United States.

Q. On that particular evening, did you happen to see Anthony DiPasquale?

A. Same answer.

Q. I don't know what that answer is.

A. I respectfully refuse --

Q. Try to read it.

A. I respectfully refuse to answer the question on the ground that any answer may tend to incriminate me, relying upon my rights under both the Constitution of Pennsylvania and the Constitution of the United States.

Q. On that particular evening, did you have a conversation with either -- well, we will take it one at a time -- with John Rispo, with regard to the killing of Gorey?

A. I respectfully refuse to answer the question on the ground that any answer may tend to incriminate me, relying upon my rights under both the Constitution of Pennsylvania and the Constitution of the United States.

Q. On that particular evening, did you have a

conversation with Francis Marino?

A. I respectfully refuse to answer the question on the ground that any answer may tend to incriminate me, relying upon my rights under both the Constitution of Pennsylvania and the Constitution of the United States.

MR. SPRAGUE: May he be excused from the stand at this point? But to remain here, as we have a bench warrant for his arrest.

MEDICAL EXAMINER: Yes.

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GREGORY CARCHIDI, recalled.

BY MR. SPRAGUE:

Q. Mr. Carchidi, when you were questioned by Mr. Session, did you deny to him that you had been in the building at 105 Spring Garden Street on June 17, 1966, at the time of the homicide?

MR. GABRIEL: I object, if your Honor please, first, because Mr. Sprague is not reporting accurately what the last witness said. And secondly, because my client has already entertained his privilege earlier.

MR. SPRAGUE: Your client can always decide to change his mind, Mr. Gabriel.

Will you repeat the question?

MEDICAL EXAMINER: Would you rephrase the question, Mr. Sprague?

BY MR. SPRAGUE:

Q. Mr. Carchidi, did you deny to Mr. Session that you were at the premises of 105 Spring Garden Street at the time of the murders?

MR. GABRIEL: Now, of course, I object to the question again.

MEDICAL EXAMINER: I think that is a proper question.

BY MR. SPRAGUE:

Q. Will you answer that, please?

A. I respectfully decline on the grounds that it might tend to incriminate me.

MR. SPRAGUE: That is all. Any questions, your Honor?

MEDICAL EXAMINER: No further questions.

MR. SPRAGUE: Mr. Carchidi, you wait in the courtroom.

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Excerpts from Transcript of Trial (In-Chambers) Discussion) (June 12 and 13, 1967) [481]

FOURTH DAY OF TRIAL

IN THE COURT OF OYER AND TERMINER, GENERAL JAIL DELIVERY, AND QUARTER SESSIONS OF THE PEACE, IN AND FOR PHILADELPHIA COUNTY

COMMONWEALTH : NOVEMBER SESSIONS, 1966

vs. :

JOHN SULLIVAN : NOS. 190 & 193, MURDER

Monday, June 12, 1967

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453 City Hall, Philadelphia, Pennsylvania

BEFORE: ALEXANDER F. BARBIERI, J., and a jury.

APPEARANCES:

(As before noted.)

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MR. DI BONA (interposing): Assuming --

THE COURT (interposing): All right. Let's see what Mr. Sprague says to this.

MR. SPRAGUE: In my opinion, Your Honor, they are not entitled to any statement made by either of the other two defendants prior to the homicide; in other words, prior to the investigation by the authorities. That would just be in the realm of evidence that the Commonwealth may or may not have for the purpose of proving its case. With regard to admissions or statements, or anything said after the homicide to the investigating authorities, that is what is being prepared.

THE COURT: How about --

MR. DI BONA (interposing): Or, to anyone, sir.

THE COURT: How about Sullivan? Just a minute. Now, let me get your position clear as to Sullivan, the defendant on trial before me. Are you saying that you don't think they should have statements made by Sullivan prior to the homicide, that you have in your files?

MR. SPRAGUE: In my opinion, Your Honor, they are not entitled to it, however, and I would

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refer the Court back on the record where I stated and I advised the Court and defense Counsel of any and all statements of Sullivan that I was aware of before and after the homicide, and I also pointed out what the substance of the oral conversations was, even though it occurred prior to the homicide. I gave that out gratuitously. I didn't think they were entitled to it, but, to avoid any argument, I, nonetheless, gave it.

With regard to the statements of the other two defendants, I am not going to be gratuitous in that sense, because I just don't think they are entitled to them.

THE COURT: I don't know the answer right at the moment, but let me think about it. I have your motion. We will take it under advisement.

MR. SPRAGUE: Well, Your Honor, just so the Court is aware, the next witness who is going to testify will relate substance and some conversation that he had not only with the defendant who is on trial, but will, as well, relate conversation that he had with one of the co-defendants.

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MR. DI BONA: Now --

THE COURT (interposing): Is that admissible?

MR. DI BONA: Now we get into a double area. First, I want those statements before he testifies. Secondly, sir, these statements made by Carchidi to McGrath--and, that's who he is referring to--are inadmissible, sir.

THE COURT: Who is McGrath?

MR. DI BONA: McGrath is the janitor who is their next witness. Now, the argument will be made to Your Honor, I am sure, that the statement of Carchidi is going to be--its admission will be--moved on the theory of a conspiracy.

My answer to that is twofold, sir. In the first place, we are not trying a conspiracy. First, the conspiracy Bill is not before this jury. Secondly, sir, my second answer is this, sir: There has been no showing of any conspiracy between Sullivan and Carchidi--absolutely none to the moment. I think Mr. Sprague will agree to that.

THE COURT: How about principals?

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Suppose they are principals present at the same time? I don't know whether it is going to be established or not. But, would that make a difference?

MR. DI BONA: Even if they are conspirators, sir, a statement made by one is no longer admissible, under the Shad (sic) case, against the other, unless--well, I will stop right there. The statement of one is not admissible against the other. Sir, now, getting to the second issue, the statement of Carchidi is not admissible against Sullivan, except on the basis of conspiracy. My answer to that is twofold: (1) There is no conspiracy charge; secondly, sir, even assuming for a moment you did have that, then they would have to show the existence of a conspiracy in order that the statement become admissible.

Now, I am going to anticipate Mr. Sprague's argument, and this is the argument used by every prosecutor in the history of mankind, I guess.

"We will later show the conspiracy, and, if we don't, then Your Honor can strike it out."

Now, I say, sir, you don't do it that way.

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They have got to show the conspiracy, first, the corpus of the conspiracy, first, in order that the statement become admissible. We don't want to have it left hanging.

Now, Mr. Sprague should at this moment be asked, sir, if this is his theory of admissibility. He should be asked what evidence he has of the existence of any conspiracy, what evidence he intends to offer in this case to show the existence of a conspiracy, because I say to Your Honor that their usual tactic is to put the statement in, and then later argue: "Well, the statement shows a conspiracy."

Now, you can't put the cart before the horse. He has got to at this point tell Your Honor what evidence there is of the existence of conspiracy, what evidence he intends to offer specifically, and not on the generality: "We will show it during the course of the case."

I think we are entitled to know now what evidence of conspiracy exists in this case.

THE COURT: Let me get around to Mr. Sprague, then. Do you agree that in order to bring out the statements--are these statements

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tending to implicate someone else, or implicate the defendant? They tend to implicate the defendant, I take it? Is that correct?

MR. SPRAGUE: Yes, sir.

THE COURT: They don't tend to implicate Carchidi, because, well--

MR. DI BONA (interposing): Carchidi is not here today.

THE COURT: O.K. So, in any event, do you agree with their contention that these statements are not admissible unless there is a conspiracy involved?

MR. SPRAGUE: Your Honor, the statement would not be admissible unless there was a contention that Carchidi was also part of the crime, and that, therefore, any action or statement done by him in furtherance of the crime is admissible against Carchidi, Sullivan or anyone else connected with the crime.

Now, in my opinion, the statement is not only admissible against Sullivan, but you asked against Carchidi, as well. Certainly, it is against Carchidi, as well, and would be used against Carchidi at his trial.

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I do not agree that the statement itself is not admissible for the purpose of helping to prove the conspiracy, because of the nature of the conspiracy. And, the nature of a conspiracy is an agreement between two or more people to do the criminal act. That can be proved by words or deeds. There is nothing which says that the agreement itself must be proven only by words or by deeds, and that words as well cannot help prove the criminal act of conspiracy.

Now, we intend to introduce what Carchidi said at a certain point, to show Carchidi's participation, as well, with Sullivan in this particular crime, and his statement is evidence of that.

MR. DI BONA: If Your Honor please, that is the most blunt--

THE COURT (interposing): I don't understand your objection. What is your objection?

MR. DI BONA: Sir--

THE COURT (interposing): Why can't he prove that?

MR. DI BONA: You and I are sitting in this room. You make a statement, right? You

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make a statement: "DiBona and I are going to hold up a bank." Is that admissible against me, unless they show that I talked to you about the bank, or that I went out and cased the place?

THE COURT: Wait a minute; wait a minute. I don't understand. The objection, then, is because he is going to prove hearsay statements of Carchidi?

MR. DI BONA: Right, sir.

THE COURT: Through McGrath, or whatever his name is?

MR. DI BONA: Right, right.

THE COURT: And, he says, "Well, it is hearsay, but it is admissible because it tends to implicate McGrath and Sullivan as part of a conspiracy."

MR. SPRAGUE: Not McGrath; not McGrath.

MR. DI BONA: No. Carchidi and Sullivan.

THE COURT: Carchidi and Sullivan. What did I say?

MR. SPRAGUE: You said "McGrath and Sullivan."

MR. DI BONA: The point is this, sir: They have shown no agreement or meeting between

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these people. They have shown nothing, and they will show nothing later. All you have got is a statement.

Now, for example, sir, to follow his argument to a logical conclusion, John Roosevelt makes a statement in California today that: "DiBona and I are going to hold up a bank in California."

Now, they have never shown us to be in the same State, in the same country; never having seen each other.

THE COURT: You don't object to the admissibility? You just think there has to be more preparation?

MR. DI BONA: No. It is admissible only if it is the statement of Sullivan. The statement's admissibility, sir, is based on the fact that Carchidi is acting for Sullivan. This is the "A" to "Z" relationship. In the civil law, for example, sir, you cannot prove the statement of the agent to establish the relationship--I mean, that is axiomatic--an agent cannot, by his own statement, establish the master-servant relationship. Am I right, sir? In the civil law you can't establish the master-servant relationship

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by the statement of the servant.

THE COURT: Why not?

MR. DI BONA: It is clear in law, sir. You have got to show acts or other conduct to establish the relationship. Once you have established the relationship, then, the servant's statements may be admissible against the principal.

THE COURT: If you ask him: "Who were you working for on such and such a date," you mean I can't let him answer that question?

MR. DI BONA: You mean ask him by whom he was employed? That's right.

THE COURT: To show the relationship, to show the wage relationship, if it is not contradicted, it is uncontradicted evidence of agency.

MR. DI BONA: Sir, suppose you get the guy on the witness stand. You put the servant on the witness stand--or, forget the servant. In an automobile plaintiff, he gets on the witness stand and says, "When the accident happened, Al Barbieri, the driver of the other car, said to me he works for John Wanamakers." Is that admissible, sir?

THE COURT: Now I understand what you

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mean, yes.

MR. DI BONA: All right. Now, what he is doing here in this case is saying Carchidi is going to say something through McGrath.

THE COURT: Unless it is part of the res gestae.

MR. DI BONA: Carchidi is going to make a statement now through McGrath. McGrath is going to testify to what Carchidi told him, and he is going to say to Your Honor, "Now, I want that statement admissible against Sullivan."

Now, I say you can only do that on the basis of an agency relationship between Carchidi and Sullivan; if Carchidi was authorized to make a statement by Sullivan, or made a statement in connection with a common plan, scheme, or conspiracy, fine.

Now, ask Mr. Sprague--and, I think we are entitled to it--is there any--certainly, there is nothing on this record at the moment of any conspiracy. There is no evidence--

MR. SPRAGUE (interposing): I am not--

MR. DI BONA (interposing): Wait a minute.

MR. SPRAGUE: I am not here to answer your questions, Mr. DiBona.

THE COURT: He is trying to set up his position here.

MR. DI BONA: Right. We will put it this way, sir: There has been no proof at the moment, any independent proof, of the existence of the corpus delicti of a conspiracy. I say to Your Honor there will be none. I am sure they have got no further evidence.

So, they are going to hang this thing on an ex-parte statement by hearsay method and ask the jury to infer from that not only the truth of that statement, but the statement being proof of a corpus of a crime, and I say, sir, it is just so completely outlandish. And, every case in the books is opposed to it. You have got to prove the conspiracy aliunde the statements.

Now, the order of proof, of course--

THE COURT (interposing): You may be right.

MR. DI BONA: No question about this.

THE COURT: It sounds reasonable.

MR. SPRAGUE: Well, it is not, Your Honor.

The point is that a conspiracy can be proven by words or by deeds. There is no--as a matter of fact, a conspiracy--

THE COURT (interposing): He says you are going to prove the whole conspiracy by hearsay evidence. You have nothing else to offer.

MR. SPRAGUE: Well, it just is wrong, Your Honor.

THE COURT: That is all we know.

MR. SPRAGUE: For example, in any conspiracy case, a statement by a person that: "I, along with 'X' planned to do so and so," the crime, is perfectly admissible for the defendant's own responsibility as a co-conspirator with the acts that "X" committed. You don't have to show anything beyond that.

He may argue the weight of that evidence, but we are talking about the admissibility of it, because a conspiracy, by the nature of the conspiracy, is the agreement by two or more people. In most instances, you never have any direct words saying, "Yes, 'X' and I agreed to do so and so."

You infer it many times from certain acts that were done.

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Now, in this particular case, what the Commonwealth will--and, by the way, let me also interject when he says there is no corpus delicti as to the conspiracy, the only corpus delicti that the Commonwealth is required to present in this case is that of the crime of murder.

THE COURT: I don't think he meant it that way. I think--

MR. SPRAGUE (interposing): If you were having, for example, a felony murder on trial here, the Commonwealth would not have to, in addition to the corpus delicti of the murder, present independently a corpus delicti, let's say, of a robbery or a burglary. And, you don't have to do it any further than what we have done, in terms of the murder here.

Now, the evidence in this case that will be presented--and, the defense knows it--is to show Sullivan in the premises at 107. There are statements from Sullivan saying to this man: "Let your work go now," or, "Don't bother with it until Sunday."

We then have Sullivan coming into this

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conference room, which Your Honor has seen on the chart, and Sullivan again saying to McGrath: "Let your work go until Sunday."

You then have DiPasquale--not DiPasquale; I mean Carchidi--coming into that same conference room.

THE COURT: While Sullivan is there?

MR. SPRAGUE: While Sullivan is there, and Carchidi now telling McGrath: "Let your work go until Sunday," the same request now by Carchidi.

THE COURT: The night of the 17th?

MR. SPRAGUE: Pardon?

THE COURT: The night of the 17th?

MR. SPRAGUE: Yes. This was on that Friday evening. This is moments, now, before the shooting, Sullivan and Carchidi both together, Carchidi now renewing, in effect, the same request that Sullivan already has been making of McGrath: "Let your work go until Sunday."

THE COURT: Without hearing Sullivan saying that?

MR. SPRAGUE: That's correct. Now, so, I propose to introduce the statement of Carchidi.

We then have evidence--

THE COURT (interposing): Which was made when to McGrath?

MR. SPRAGUE: Right at the time I am talking about, while Sullivan is there.

THE COURT: While Sullivan is there?

MR. SPRAGUE: Yes.

THE COURT: Well, that is different, though. Why isn't that admissible?

MR. DI BONA: My telling you not to work sir--is that evidence of a conspiracy?

THE COURT: No.

MR. DI BONA: Wait a minute, sir.

MR. SPRAGUE: May I finish?

MR. DI BONA: One moment, sir, please. The Judge asked me a question. If I were to say to you, sir: "Why don't you not work today? Work next week"--

THE COURT (interposing): I am not talking about that.

MR. DI BONA: Does that make me in a conspiracy with Sprague and everyone else, sir?

THE COURT: Maybe Mr. Sprague doesn't understand me. What are the other statements

that you want to offer? Were there other statements besides that?

MR. SPRAGUE: Yes. I was getting to that.

THE COURT: O.K.

MR. SPRAGUE: You have the statement which I have just referred to by Carchidi in the presence of Sullivan, the same request as already made by Sullivan, which is proper for this jury to hear on the question of conspiracy and concert of action between these two people. It is then followed by Sullivan leaving the room, and there will be testimony that just prior to this, Gorey had been in the room and had stepped out. You then have Sullivan leaving the room, and Carchidi having some further conversation. And, I don't recall at this point whether he repeated the request about let the work go until Sunday, but you then have what the witness describes as the explosion of firecrackers, what he thought.

This is within minutes after Sullivan has left the room. And, the witness then says to Carchidi: "What was that?"

And, Carchidi makes a response to the witness McGrath, saying: "Don't say nothing," which, again, is proper evidence and permissible for the jury to hear in showing the concert of action between Carchidi and Sullivan or others.

THE COURT: It is also part of the res gestae, too. It could come in on that basis. Couldn't it?

MR. SPRAGUE: Your Honor, it doesn't have to rest on that basis. These are perfectly proper statements by a person who was under indictment as a participant in the same murder. Now, following that--

THE COURT (interposing): Well, that has no evidentiary value, the fact that he is under indictment.

MR. SPRAGUE: No. I don't mean it in that sense. I am talking about the evidence.

THE COURT: All right.

MR. SPRAGUE: You then have it followed by this witness McGrath, who leaves the premises, and sees Carchidi's car down there, and Sullivan's car. And, when the witness comes back in about fifteen or twenty minutes, those two cars, plus

this black Cadillac to which reference was made, are all gone.

MR. DI BONA: Now, sir, assuming all this--

THE COURT (interposing): I don't see why that wouldn't be admissible evidence.

MR. DI BONA: Oh, if Your Honor please, if this represents a statement of the law that Mr. Sprague sincerely--

THE COURT (interposing): No. I don't care about the law.

MR. DI BONA: Wait a minute.

THE COURT: Let me ask you--let's forget the law for a moment. These things happened, I understand, within moments of the shooting.

MR. DI BONA: No, sir. That is another thing that is completely wrong. They haven't shown the shooting occurs at this time. As a matter of fact, the only evidence in this case is inconsistent with this, completely. They hear firecrackers. That's all they hear, sir. And, if Your Honor please, Your Honor heard me going on--

THE COURT (interposing): It is supposed

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to be the gun going off, I guess.

MR. DI BONA: Your Honor heard me going on and on with Levy. People standing right outside of the building within ten feet heard only firecrackers. That's all they heard, sir. Nobody went up there to check, because they were convinced it was firecrackers. That is all it was. And, I honestly think that I believe that is all that occurred, sir. This killing occurred long after that--long after that--but, apart from that, sir, Carchidi makes a statement after Sullivan is gone. Where Sullivan went, they can't and they won't establish by their evidence. Sullivan left the conference room. As a matter of fact, he went back to his office, and the evidence will show that.

But, can he be responsible for what Carchidi said? How do we know, sir, that Carchidi was not in a conspiracy with John Smith, Tony Brown and George Raft? How do we know that, sir? Is the fact that Carchidi said: "How come you are cleaning today," right--

THE COURT (interposing): Well, yes. But, look. The probative value of it is always--

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MR. DI BONA (interposing): But, sir--

THE COURT (interposing): We are talking admissibility.

MR. DI BONA: We are talking admissibility. No statement of an alleged co-conspirator is admissible, sir, until they show a conspiracy, the agreement, as he says. Now, where is the evidence of the agreement?

If they would show, sir, for example, that Carchidi and Sullivan had gone out and purchased guns, or that Wullivan and Carchidi had met before this and discussed something, or that Sullivan and Carchidi had an argument with Gorey, or that Wullivan and Carchidi had discussed their plans, or something of that sort, something to show an agreement between the two, then the statements are admissible.

But, here there is no agreement, no evidence of any. For all this record is concerned, sir, for everything in this record, Your Honor can't make a finding that Sullivan even knew Carchidi prior to that night. There is no evidence that Sullivan had ever seen Carchidi in his life prior to that night, sir, prior to his walking

into that conference room. There is not a scintilla of evidence in this case that Sullivan knew Carchidi at that moment, sir.

Now, how can his statement become admissible, the statement of Carchidi become admissible, against Sullivan? All he asked the man in the presence of Sullivan was: "How come you are cleaning tonight?"

Now, is this evidence?

THE COURT: Who said that?

MR. DI BONA: Carchidi. He says to McGrath: "How come you are cleaning tonight?" That's what McGrath says, or the credibility of that is another issue, but all he saus is: "How come you are cleaning tonight?"

Right? Now, how does that become evidence of a conspiracy or plan by Carchidi, Sullivan, or anyone else, to kill Gorey? Now, sir, it is as outlandish as all that.

MR. SPRAGUE: He is arguing, Your Honor, on the weight, and he is making a jury argument, not the admissibility of this evidence.

THE COURT: Well, we--

MR. DI BONA (interposing): Suppose, sir--

THE COURT (interposing): Off the record.

(There was an off-record discussion.)

MR. DI BONA: Judge, we are now at a crucial point, and this ruling is important both to the Commonwealth and the defense. I say to Your Honor with all the sincerity at my command, sir, it is just absolutely, positively, conclusively inadmissible, unless the District Attorney is willing to state: "Your Honor, I will follow that up by showing the further evidence of the existence of a plan." If he has got any other evidence, fine.

MR. SPRAGUE: I submit that this evidence of itself, Your Honor, is sufficient.

MR. DI BONA: In other words, sir, there is no other evidence in this case with respect to the existence of a conspiracy. I mean, you have got to make that assumption for the purpose of this argument. I say it just isn't even close.

THE COURT: Off the record.

(There was an off-record discussion.)

MR. PERUTO: Before the statement can be admissible, to begin with, for McGrath to testify as to what Carchidi said, you start off,

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No. 1, on the basis of its being hearsay. Now, you state, sir, that it is taken out of the realm of hearsay if it is the statement of a defendant.

No. 1, Carchidi is not the defendant in this case. Now, can you get it then in on the basis of the statement of a co-conspirator? Well, any statement--and, after all, the statement is in the nature of an admission--any admission is not admissible until, first, you have proved the corpus delicti of any crime. Now, if you were to allow this in, it would give an inference to the jury. Now, we have to decide whether it is a proper inference or not a proper inference.

We have not shown a conspiracy between Carchidi and Sullivan. In the first place, sir, everything negates that, because the Commonwealth's testimony is that during the time that Carchidi is with McGrath, in McGrath's presence, this, according to the Commonwealth's theory, murder occurred. Now, that would be--

THE COURT (interposing): Off the record.

(There was an off-record discussion.)

(The proceedings were resumed in open

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FIFTH DAY

IN THE COURT OF OYER AND TERMINER, QUARTER SESSIONS OF THE PEACE, AND GENERAL JAIL DELIVERY, IN AND FOR THE COUNTY OF PHILADELPHIA

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COMMONWEALTH : NOVEMBER SESSIONS, 1966

vs. : NOS. 190 & 193

JOHN SULLIVAN :

- - - - -

TUESDAY, June 13, 1967

- - - - -

453, City Hall, Philadelphia, Pennsylvania

- - - - -

BEFORE: HONORABLE ALEXANDER J. BARBIERI

APPEARANCES:

RICHARD A. SPRAGUE, ESQ.,
Assistant District Attorney,
For the Commonwealth;

G. FRED DI BONA, ESQ.,
A. CHARLES PERUTO, ESQ.,
For the Defendant.

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(In Chambers)

MR. DI BONA: First, I would like to call Your Honor's attention to the fact that about a half an hour ago the Jury was brought in and as they were walking up the corridor, the west side of the hallway of the Jury Room, the press was there and took motion pictures of the Jury as they came into the Jury Room.

We think it is prejudicial in the sense that it highlights the presence of the Jury out of proportion. I realize that nothing can be done except that Your Honor direct the Court's Officers not to let them do it.

MR. SPRAGUE: Are you making any motions other than that?

MR. DI BONA: Again, I am not going to make any motions.

MR. SPRAGUE: Are there any other motions?

MR. DI BONA: I will not make any motions for the withdrawal of any juror because there is nothing to gain from such a motion. It is obviously a plan of the Commonwealth to have the withdrawal of the juror.

THE COURT: I understand your position, Mr. Di Bona. The only thing I can do is to have the Court Officer try to avoid this because of the reasons you have given. There must have been some error in that; I don't know.

All right, you have made your comments and I ask

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that the Court Officers try to prevent this from happening in the future.

MR. DI BONA: Your Honor, do you recall the testimony of Ellen Caputo ? Mr. Sprague stated to Your Honor, in view of the fact that the witness had testified that he had a copy of the oral statement that was made to the detective, and it was understood that the statement would have to be furnished to Defense counsel for cross-examination.

MR. SPRAGUE: I think you should also say I did that last night.

MR. DI BONA: Yes, yesterday afternoon when I called I didn't ask you for it, you gave it to me at that time. You dictated to me and I took it down in longhand. I have taken those notes. I would, therefore, ask that Ellen Caputo be brought back to the witness stand so that I may complete my cross-examination.

MR. SPRAGUE: I have no objections to that, but I will ask the Court Officer to check to see if she is here. As I understand your Honor's admonition to her, when she left last night, she was not to speak to anyone, and if I may say so, as far as the Commonwealth is concerned, no one stepped near her. I don't know where she is.

While on this subject, I do take exception to the

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Court singling out that one witness to admonish her in the presence of the Jury, with regard to not discussing this case with anyone or having anyone speak to her. The Court also has shown solicitude from the Defendant's standpoint of view not to have said anything, in the presence of the Jury or at one time in the open court room, about the fact that certain people took the Fifth Amendment. I think the Court making this statement in the open court room that it did in front of the Jury about, "Don't speak to anyone or let anyone speak to you," that it did improperly give or could give rise to the Jury thinking that the Court feels that something is wrong with this witness. Again, I have no motion to make on this, but I just wanted to bring that to the Court's attention.

THE COURT: I just don't see how the Jury could have interpreted this the way you inferred that they might. This is the first witness in front of the Jury and the question of further testimony was discussed. Maybe it should not have been, but it was. I think that it was only natural to tell her that, and I don't think it is comparable to somebody pleading the Fifth Amendment.

Do you have something to say?

MR. DI BONA: Yes, Your Honor. Do you have a motion with respect to that?

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MR. SPRAGUE: No, I'll play the game that you played when I asked you did you have a motion.

MR. DI BONA: I would like to add to that briefly. There is a world of distinction as to your points, and indeed, while Mr. Sprague was arguing so eloquently that the Fifth Amendment should be pleaded to before the Jury --

THE COURT: He didn't take that position.

MR. DI BONA: He did, sir, and it was brought out that when the shoe was on the other foot it made a difference. He argued most eloquently that the Commonwealth should not be forced to plead the Fifth Amendment before the Jury.

THE COURT: Do you want to make any comments on that?

MR. SPRAGUE: Which case was that?

MR. DI BONA: The North case. In that case you requested, as I understand it, and stated, that it was unfair to have a plea of the Fifth Amendment before the Jury, which the Defense wanted in their case.

Now, I contend there must be a distinction and I think you ought to bring that out to be discussed. I have a feeling that we would all feel better if we didn't, in front of the Jury.

MR. SPRAGUE: I do have a comment to make.

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THE COURT: Do you have another point?

MR. DI BONA: Yes, Your Honor. With respect to McGrath, before Your Honor makes a ruling I would like to call to Your Honor's attention first, the statement of facts.

Your Honor, great weight was attached yesterday, and I listened, that Sullivan and Carchidi, both made statements to McGrath in the presence of each other. Number one, in the office where Sullivan asked,"how come you're cleaning up tonight", was not made in the presence of Carchidi and the second time he asked, "how come you're cleaning up tonight," was not made in the presence of Carchidi. Carchidi's statement, number one, "Why are you cleaning up tonight" and "get out of here, you heard nothing," both were made to McGrath in the absence of Sullivan.

There is no indication in this case now and in McGrath's testimony before the Medical Examiner of any such statement.

I call to your attention something which I think is a succinct statement of law and can give clarification with respect to this matter. Commonwealth v Rosen, 141 Superior Court 272 at 276; in discussing the very issue before Your Honor as admissible to alleged statements of alleged co-conspirators, and in that case I

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would like to add that the conspirators all were tried on charges. "Certainly, a foundation must first be laid by proof sufficient to establish the unlawful agreement, before the acts or declarations of one defendant during the existence of the conspiracy, may be received as evidence against all the others."

In other words, the Court said that you must first have the existence of conspiracy. We don't suggest, Your Honor, that means that the Commonwealth must have a man come in to testify that A, B, and C were standing on a street corner and said, let's agree to become confederates with each other to commit a crime. Here you are proving the conspiracy by showing a meeting of people and a procurement of weapons. The Commonwealth's designed purpose is making evidence of that kind prima facie for establishment of an agreement; once you have done this, once you offer that into evidence and place in evidence the statement or acts of these conspirators, you go on to further conspiracy. In this case, as Mr. Sprague stated on the report, there isn't the slightest scintilla of evidence that there is a conspiracy. I further state that there is no evidence of conspiracy except the so-called declarations, the comments of Sullivan and Carchidi to McGrath. I submit that under those circumstances there

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is not the slightest scintilla of evidence for admissibility.

Then, sir, I would like to add to that, that the requirements set forth in the Rosen case is to establish the admissibility where co-conspirators state them. It is obvious that you can't introduce into evidence a statement made by the other person, third person until (one) the existence of conspiracy is shown; and (two) the person conceived was not one of the conspirators. There is no evidence in this case that Carchidi was a conspirator. That is my argument.

MR. SPRAGUE: Are you finished, Mr. Di Bona?

MR. DI BONA: Yes.

MR. SPRAGUE: Your Honor, I am not sure that since we have recessed from yesterday until today, this Court has studied the law that is applicable in this area. I don't see much point to arguing the law except to state that certainly concerted action is made admissible, the statements of any of the co-conspirators. What I suggest to this Court at this point are the facts of this case and under the facts, I submit the following, and I include what is already in evidence is included in my offer of proof.

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You have already in evidence that two people were killed by ten different bullets shot into two individuals, coming from two guns. Whatever the space of time was from that, it is permissible to infer concert of action by two or more people. Certainly the law is that once there is evidence of concert of action by two or more, then the statements by any and all people would be admissible in terms of being co-conspirators.

Beyond that incident in itself, there is also the following, which I repeat, is in my offer of proof:

McGrath's testimony will relate his coming to this building and seeing Sullivan looking out from an office window that was not his office. Among other things, McGrath will relate conversations that he had with Sullivan, wherein, among other things, Sullivan suggested that he let the cleaning go until Sunday. This conversation occurred on Friday after 6:00 P.M.

THE COURT: Did he give any reason for that?

MR. SPRAGUE: Pardon me, Your Honor?

THE COURT: Did Sullivan give any reason for saying, let it go until Sunday?

MR. SPRAGUE: Yes, Your Honor, he did say in words to the effect that there was going to be a meeting in there and they were going to mess things up and so

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forth, but he did say, let it go until Sunday. Following that, you have, and will have, testimony by McGrath that, he, McGrath, after he had gone about cleaning up and he had been in the conference room and had a brief conversation with the deceased, John Gorey; that within seconds of John Gorey leaving that room --

THE COURT: In what room did he have the conversation?

MR. SPRAGUE: In the conference room, which I think Your Honor knows from the setting up of the map is fairly close to the location of the office that Sullivan had been in and the office that had been labelled Gorey's office. Within 20 to 30 seconds after Gorey leaves the conference room, McGrath testified that Sullivan came into that conference room and again said words suggesting that he let the cleaning go until Sunday. I at no time said that either of those two conversations by Sullivan was said in the presence of Carchidi, and when Mr. Di Bona now makes much of the fact that his reviews show that it was not made in the presence of Carchidi, he is building his sandman up to rip him down because I haven't said that. Following the second conversation with Sullivan, Sullivan repeats words to the effect about letting the

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cleaning go until Sunday, McGrath will testify that he was still in the conference room with Sullivan when Carchidi came into that room, and I may say as well, Your Honor, that part of McGrath's testimony will be that when he arrived at this building and saw Sullivan looking out the window --

THE COURT: Which window?

MR. SPRAGUE: The window from Amoroso's office. The testimony will be that is the only office that looks out over the parking lot; McGrath saw two cars on the parking lot, one is the car that he identifies as a car belonging to Sullivan and another is a black Cadillac, which he identifies because of its banged-in right side, and is a car that belongs to one John Rispo. Subsequent evidence will show that the car had been loaned by Rispo to a man by the name of Di Pasquale. McGrath will relate also that he went into the office building and he first saw Sullivan from inside the office; that Sullivan was observing the two deceased, John Gorey and Rita Janda, and that Sullivan made a comment about Rita Janda not being a bad-looking broad. There will also be testimony that this office was not Sullivan's office. Getting back to the conference room, McGrath will testify that when Carchidi came into the

evidence of conspiracy. I take issue with that because there must be two issues; if you have overcome the requirement of some evidence of conspiracy, you then have the second, evidence as to whether Carchidi was one of the co-conspirators and the last point, the Jury can be instructed to disregard it.

THE COURT: I understand what you are looking at, but the law of Pennsylvania is not with you. The law of Pennsylvania says, to establish the concert of action after the declaration is entered into, provided that there is some slight indication that it was admitted. We have more than that here with the offer of proof. To be perfectly frank, I spent a lot of time, and I have already put that on the record, and I am convinced of all the evils of the ruling, the one that recommends itself to me at the moment, is to allow this evidence. I think it cannot be harmful.

MR. PERUTO: I think the Court is looking upon it as an error, but with concert of action I know that no one in this room could ever define concert of action between Carchidi and Sullivan, so to put Sullivan in that light is slight error.

(Whereupon, at this time, there was an off the record discussion.)

(Whereupon, at this time, a luncheon recess was held)

room there was a conversation between Carchidi and McGrath and Sullivan then left the room. Now, I said yesterday that when Carchidi came in he related to McGrath, "Why don't you let the cleaning go until after the Sunday meeting." I was under the impression that the conversation was when Sullivan was in the room and I said I do not know whether it re-occurred when Sullivan left this room. Counsel said it was the reverse; that no conversation took place when Sullivan was there, but when McGrath was there.

MR. DI BONA: That's what he said.

MR. SPRAGUE: In any event, within a short period of time after Carchidi comes in and there is no conversation between Carchidi and Sullivan, although again, subsequent evidence will show that Carchidi and Sullivan knew each other for two to two and a half years of working at the same place.

THE COURT: When was this that there was no conversation?

MR. SPRAGUE: When Sullivan was in the conference room talking with McGrath, having related to McGrath again, "why don't you let the cleaning go until Sunday." Carchidi came in there and immediately spoke with McGrath and there was no greeting between Carchidi and Sullivan, although in fact they do know each other and have been associates anywhere from two to two and a half

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years. I submit to the Court that the lack of greeting is a significant factor there as well. After Sullivan left the room, and this is within, I think, a matter of five minutes after he had entered and after Gorey had left this room, Carchidi continued on with some conversation with McGrath. During this conversation, as the Defense said, it was repeated or said, "why don't you let the cleaning go until Sunday." McGrath will relate that he heard loud noises which he thought were firecrackers. He will also relate that at that time, Carchidi was behind him and he turned to Carchidi and said, "what was that?"

Whereupon, Carchidi related words to the effect, "get out of here and don't say nothing."

Now, at this point McGrath left the building and upon leaving the building, I think I should point out to the Court that McGrath would testify that the doors of the second floor into the various offices were opened for going into them for the purpose of cleaning them up and whatnot, and when he, McGrath, left the premises and went downstairs he observed on the parking lot the car which he identifies as Sullivan's and that same black Cadillac with the banged-in right side and as well, he observed a car which he identifies as Carchidi's car.

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He, McGrath, leaves. He will relate that he came back; frankly he came back because he thought that having rushed out of the place and leaving his bucket and mop and cleaning material upstairs, that he was being set up as a patsy by one of theDefendants. That is the reason why he was rushing out. In any event, he came back in a short time and what he observed was that the cars belonging to Carchidi and Sullivan and the black Cadillac, with the banged-in right side, were missing, and no longer at the scene.

I also refer the Court to the fact that it is already in evidence that when Sullivan was questioned by the police, he stated that he was not in the building at the time of the shooting.

THE COURT: That carries with it the inference as to when the shooting took place.

MR. SPRAGUE: That carries a number of things, Your Honor. That is one part of it. The second part is that when McGrath heard the firecrackers, that is when the shooting took place with the fact that Sullivan's car, still down there when he, McGrath, left, and that is certainly sufficient to put a lie to what Sullivan said, that he was not at the place at the time of the shooting. In any event, that argument is for the Jury.

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I submit in evidence the presence of Carchidi, the conversation Carchidi had with McGrath, are admissible in this case. There is a slight addition of evidence necessary in the sense of him being there; there is the lack of greeting between himself and Sullivan, the awareness that each knew the other would be there, neither being surprised at seeing the other there. The factor that the crime itself gives rise to inferences of having been committed by two people; the fact that the cars were there and gone by the time McGrath came back, also is sufficient to allow this testimony. I would also say there is a case which we have for the Court, which Mr. Wolf will hand out. In a sense, it is part of what occurred and is well worth looking into as to what would be a verbal act. The words of Carchidi, "get out of here and don't say anything" are really no different than the act which could be of holding someone, or in fact pushing him out as well.

Off the record.

(Whereupon, a discussion was held off the record.)

MR. SPRAGUE: For the record, Your Honor, that summarizes the sum of my statement.

MR. DI BONA: Your Honor, I have never heard such ridiculous and obscure arguments. What Mr. Sprague is

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saying is that a statement is admissible against Carchidi and therefore becomes admissible against Sullivan because Sullivan said, "how are you doing." The issue is not the admissibility of the statement; the issue is against Sullivan.

My friend here speaks of concert of action, the fact that two guns were used shows concert of action. Let's assume that to be a fact.

THE COURT: I don't want to assume that is what it meant.

MR. DI BONA: Two guns were used and ten shots were fired, which indicates that one or more people were acting in concert; that well may be. How do you get Sullivan in that concert of action when Carchidi makes no statement in the presenceof Sullivan and Sullivan makes no statements in the presence of Carchidi? How on God's earth can you say what Carchidi said can be used to convict Sullivan of murder? If I was sitting in that Union hall and heard firecrackers, I think my reaction would be, let's get the hell out of here. There is no indication that I committed murder or thought that it was committed. There isn't a single scintilla of evidence to this case that any killing occurred at Local 107 at 7:15 or 7:30 that night; there is not the slightest scintilla of evidence.

As a matter of fact, the evidence, if anything, is quite the contrary. The evidence is that the killing occurred on June 18th, on the Saturday morning. The date of death is in Dr. Fillinger's report, and it says June 18th. Secondly, no one can say that the bullets were fired at 7:15 or 7:30. I brought out yesterday, as Your Honor recalls, from Mr. Levy that three people on the sidewalk under the window of Gorey's office heard what they thought were fire-cracker noises, which is not consistent with bullets, and they didn't pay any attention to it. McGrath didn't pay any attention to it. He testified that he thought the noises were firecrackers. He went back to the building and never checked with Gorey or with anyone else. I cited to Your Honor the cases and there is no dispute that the Zuern and theJermyn case all require proof sufficient to stand the unlawful agreement as of declaration. One defendant may be the receiver as evidence against the other. I submit there is just no basis of law or fact for Your Honor to admit that statement in evidence.

MR. SPRAGUE: Are you finished, Mr. Di Bona?

MR. DI BONA: Whatever Sullivan did and said, everything alleged to have been said was completely with innocence and not guilt. There is nothing in this

case that says that any bad motive on the part of Sullivan existed.

MR. SPRAGUE: I would like to have a brief word, please.

MR. DI BONA: And then, of course, there is no evidence that Carchidi was a conspirator, and if so, there is no evidence shown that he was a conspirator with Sullivan.

THE COURT: Do you have something to say?

MR. SPRAGUE: I think the fact that counsel feels the need to label arguments ridiculous and obscure, points to a great deal of frailty. I think it adds to the weakness of his position; part of his argument is that everything that Sullivan did is consistent with innocence;when he argues about the time of the killings that there is no proof that they happened at 7:15 or 7:30, and when he argues as to what Mr. Levy said.

The issue before the Court is the slightest evidence showing a concert of action and I submit that the summary that I gave to the Court, the Court should find it satisfactory that there is slight evidence. I will cite the following cases: Commonwealth v Lowry, 374 Pa. 594 at Page 600, 1953; Commonwealth v

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Thomas, 337 Pa., Page 72; and Commonwealth v Stranz, 328 Pa. at Page 33. The Commonwealth v Cohen, 203 Pa. Superior Court 34, 1964, at Page 45, the Court cited, Chief Justice Gibbons: " Now, the least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all."

THE COURT: I don't think you need to multiply this any further, Mr. Sprague. We are in my own chambers and I have researched this matter very strenuously.

MR. PERUTO: All of these cases cited are concert of action, that phrase being repeated over and over between two parties is actually the crux of the case. After listening to what Mr. Sprague had to say, I will try to put this in. Number one, as to the automobile alleged to have been borrowed by Di Pasquale from one John Rispo, there is no act indicated that Di Pasquale in any way is connected with the crime. There is no allegation that Rispo was connected with the crime. Beyond that, it shows that Sullivan was looking out of a window that was not his. That in and of itself does not mean anything ; to say that it was not his office does not mean that he did not have authority to use it.

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THE COURT: You are telling me what the intent might show, and I am only interested in the admissibility as to hearsay.

MR. PERUTO: I am getting to that, Your Honor. All of the names and activities that Mr. Sprague has spoken to you about, you will note, that he never mentioned the acts of Carchidi. It was Sullivan who looked out of the window, never Carchidi. In other words, when you have concert of action between two parties, it is those two parties that we speak of. There is no concert of action in any way that involved Carchidi; therefore, you can't have it fit under the concert of action ruling.

THE COURT: I understand that, but I think the District Attorney is trying to demonstrate the factual side for his position. The authority on this issue, the only issue we are considering today. What we are trying to do is to find whether a certain hearsay statement is admissible. Hearsay may be something stated by Sullivan to McGrath, which is admissible, of course. Notice that something stated by Carchidi to Sullivan is questionable. The basis on which the statement could get in here, the one basis, is an exclamation by the firing of the firecrackers or guns or whatever he heard,

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which I think would be admissible because it's a spontaneous exclamation in connection with the firing of a firecracker or a gun, and would have res gestae characteristics and would perhaps get in on that basis. The other remaining thing is a statement by Carchidi out of the presence of Sullivan, not in his presence, which is a hearsay statement and which the Commonwealth admits may only be admitted on the basis that Carchidi and Sullivan are co-conspirators. The law is very clear, as was established yesterday, concerning hearsay solely on the basis of the alleged conspiracy. There is no question about that.

However, there are some cases that do make it clearer as to the hearsay statement on the basis of the conspirator, that there must be some evidence of the conspiracy. As a matter of fact, some cases even say there must be proof of the conspiracy and the State of Pennsylvania is in line with that proof, which doesn't require absolute proof for admission of such a statement, but merely requires some prima facie evidence.

Now, that doesn't mean that the Commonwealth has to prove a prima facie case of conspiracy in order to have the hearsay statement admitted. The Commonwealth

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must have some evidence of conspiracy. In Zuern and Jermyn, cited by both sides, it says that there need be only slight, the word slight is used. What constitutes a slight evidence of conspiracy is the only question I have before me, really, because the law is very clear. It may be that if the slight evidence turns out to be not sufficient to support an adequate showing of conspiracy and would invalidate the admission of the hearsay statement, the Jury will have to be instructed at a later time in the trial to ignore or disregard it.

I think the additional evidence must be added after the statement in accordance with the rule in the Horvath case, 183 Superior Court, 286. This is the Pennsylvania rule. Basically you get down to what constitutes, for our present purposes, a slight showing of conspiracy. I am aware that we have an offer of proof, which states many items of proof, perhaps none of which within itself constitute a slight showing of conspiracy. I am very concerned about this problem and I want everybody to note this. This may be a crucial element in the case for both sides. It is a first degree murder charge and it looks like first degree killings, terribly important to the Defense. On the other hand, this is the party and it

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is enough to go to the Jury as to his guilt and he is the proper defendant here on evidence that will ultimately go the Jury, and the testimony adduced, and the Jury will so find then the seriousness to the present circumstances on a technical basis.

Taking all of these various little pieces that the District Attorney contains in his offer of proof, would I say that I see another circumstance and technical factor to the circumstances, and perhaps to rule a little impartial to either side.

It seems to me the factors in my mind are the persons concerning the facts. At this time, it would be perhaps more of a question, such as, the presence of Sullivan and Carchidi at a time which are not the normal working hours. The testimony will show that the working hours were not at night and the office was apparently closed. From what we have heard, Sullivan and Carchidi are in the conference room and their presence there is not explained. This doesn't mean that there is positive evidence of anything, but it is inferentially an indication of something unusual, or could give rise to the inference of concerted activity on the part of these two people in a spot very close to that where the killings took place. I am not

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pretending at this point to pass on the sufficiency. This offer of proof to establish conspiracy in this case is in its final stage, but for this purpose it seems to me that in exercising whatever discretion I have, I would not wish to exclude the testimony. I find no evidence that requires me to do so, and the evidence that I do see makes it impossible for me to conclude that it shouldn't be admitted at this time.

I will grant you an exception.

MR. PERUTO: Exception. May I add a few remarks?

THE COURT: Yes, you may.

MR. PERUTO: First, this being a rule of the law, I think every citizen in the country should get a hut in Siberia and stay out of reach of humanity. It seems that all t e rules of law developed over the years are being thrown to us at this time. Your Honor, as to working hours, the exact working hours of McGrath, were the same working hours of Carchidi, since they both had the same job.

THE COURT: There is no evidence as to what Carchidi does.

MR. PERUTO: He is a janitor.

THE COURT: There is no proof.

MR. PERUTO: Your Honor, the fact that he was there after working hours, there is no evidence to

support that statement.

THE COURT: Why are two janitors in one room?

MR. PERUTO: Perhaps that's where they were working.

THE COURT: Is that the explanation?

MR. PERUTO: You put me in this position; a statement by Carchidi offered into evidence and can only be refuted by Carchidi.

THE COURT: That is the law because a defendant refuses to testify he can't offer something.

MR. PERUTO: The defendant can testify, but how can he testify to what Carchidi said, and you can't put Carchidi on the record.

THE COURT: In that such care in submitting a statement like this, it may be that we determine sometime not to use it, if so, no harm is done, and the Jury will ignore it. If it turns out that the ruling was erroneous, the Defendant can't suffer by this. But to terminate this, let's say to terminate at the presentation of the Commonwealth's case at this time, when we know that it is correct in permitting this evidence and when we may be erroneous not to think so.

MR. PERUTO: Your statement in the ruling is that the sole issue is whether or not there is slight

go to page 652, which stood before

AFTER LUNCHEON RECESS

THE COURT: I think the record should show that two of the jurors have had medical treatment and they are both here. I hope they are all right.

Mr. Wallace Holliman, how are you feeling?

MR. HOLLIMAN: I am all right, Your Honor. I had a touch of laryngitis.

THE COURT: Are you coming along all right?

MR. HOLLIMAN: I am feeling very good outside of slight hoarseness.

THE COURT: Mr. Jim Gunther, how are you feeling?

MR. GUNTHER: Very well, sir.

THE COURT: Let the record show that I have two certificates by physicians here, if you want these noted in the record.

MR. SPRAGUE: That's fine, sir.

THE COURT: Are you calling your next witness?

MR. SPRAGUE: Yes, Your Honor. Francis McGrath.

THE COURT: We will have a roll call first.

(Whereupon, at this time there was a roll call of the Jury and each juror was present and accounted for.)

MR. SPRAGUE: At this time the Commonwealth calls Francis McGrath.

THE COURT: Very well.

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MR. DI BONA: Your Honor, I had planned to continue the cross-examination of Ellen Caputo, but I understand she is not here.

THE COURT: Every effort must be made to get her here as soon as possible. You will be given the privilege to continue your cross-examination.

MR. DI BONA: Thank you.

COMMONWEALTH'S EVIDENCE (continued)

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EXCERPT FROM TRANSCRIPT OF TRIAL IN COMMONWEALTH V. JOHN SULLIVAN (June 16, 1967)

EIGHTH DAY

IN THE COURT OF OYER AND TERMINER, QUARTER SESSIONS OF THE PEACE, AND GENERAL JAIL DELIVERY, IN AND FOR THE COUNTY OF PHILADELPHIA

- - - - -

COMMONWEALTH : [illegible]

vs. : NOS. 120 & 137

JOHN SULLIVAN :

- - - - -

Friday, June 16, 1967

- - - - -

[illegible]

- - - - -

BEFORE: HON. [illegible] J. BARSIMI

APPEARANCES:

RICHARD A. SPRAGUE, ESQ.,
ASSISTANT DISTRICT ATTORNEY,
For the Commonwealth;

G. FRED DI BONA, ESQ.,
A. CHARLES PERUTO, ESQ.,
For the Defendant.

WE REGRET THAT THE ORIGINAL OF THIS PAGE WAS OF VERY POOR PHOTOGRAPHIC QUALITY.

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THE COURT: Let the record show that I have reviewed the matter and I have all the copies that I ordered to refresh myself as to all the facts in the case so as to be fully aware of all the inferences and the facts. My judgment therefore, is that there is sufficient evidence to show a prima facie case and to

have the case go to the jury. The [illegible] is overruled.

MR. PERUTO: Mr. Di Bona has entrusted the defense to me and the defense rests.

MR. DI BONA: Now, I move for admission of the exhibits offered by the defense. Defendant's Exhibit 1, the photograph of the union hall on North Front Street.

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